FILED
JUL 13 2005
OFFICE OF THE CLERK

No. 05 86

In The Supreme Court of the United States

PIPER JAFFRAY & CO., and
ROBERT ENGLISH, et al.,

Petitioners,

v.

JOHN P. DALY and AUDREY M. DALY,
JOHN D. SHEA and BRENDA SHEA,
THE ESTATE OF ALICE A. FRANEY, ROBERTA J.
EMETT and KATHLEEN E. MERRETT, VICKI
BERRYMAN and JAMES LEARY,

Respondents.

On Petition For Writ Of Certiorari To The Montana Supreme Court

PETITION FOR WRIT OF CERTIORRI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Montana Supreme Court's judicially imposed requirement that pre-dispute arbitration clauses commonly contained within securities industry customer agreements must be explained to the customer before the agreement is even executed violates the Federal Arbitration Act?

2. Whether the Montana Supreme Court's invalidation of pre-dispute arbitration clauses commonly contained within securities industry customer agreements and generally enforceable in other jurisdictions impermissibly interferes with the relationship between broker-dealers and their customers in interstate commerce in violation of the Commerce Clause?

PARTIES

Petitioner Piper Jaffray & Co. ("Piper Jaffray"), Defendant below, is a registered broker-dealer conducting business in all 50 states, including Montana. At all times material to this case, Piper Jaffray conducted business at, among other locations, its Branch Office in Butte, Montana.

Petitioner, Robert English, Defendant below, was at all times material the Piper Jaffray Branch Office Manager in the Butte Branch.[1]

Defendant Thomas J. O'Neill was at all times material the Piper Jaffray Account Executive for each of the Respondents.[2]

The plaintiffs below, Respondents here, in these six actions were, at all times material to the case, clients of Piper Jaffray. Each of the plaintiffs had signed one or more customer account agreements with Piper Jaffray containing a pre-dispute arbitration clause, typical of the clauses used throughout the securities industry nationwide. Each of the plaintiffs was at all times material a citizen of Montana and maintained an account with Piper Jaffray's Butte office.

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[1] Mr. English was not named as a Defendant in *Daly v. U.S. Bancorp Piper Jaffray Inc., et al.*

[2] Mr. O'Neill is not represented with respect to this Petition.

RULE 29.1 LISTING

Piper Jaffray & Co. was formerly U.S. Bancorp Piper Jaffray Inc., a wholly owned subsidiary of U.S. Bancorp. During the pendency of this litigation, the name and ownership of U.S. Bancorp Piper Jaffray Inc. changed in connection with the spin-off by U.S. Bancorp of its capital markets business on December 31, 2003. To effect the spin-off, U.S. Bancorp contributed its capital markets business, including U.S. Bancorp Piper Jaffray Inc., to a newly formed subsidiary, Piper Jaffray Companies, and subsequently distributed all of the shares of Piper Jaffray Companies to the shareholders of U.S. Bancorp. In connection with the spin-off, U.S. Bancorp Piper Jaffray Inc. changed its name to Piper Jaffray & Co. and became a wholly owned subsidiary of Piper Jaffray Companies, and Piper Jaffray Companies became a publicly traded company whose shares are traded on the New York Stock Exchange under the symbol "PJC".

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the judgments of the Supreme Court of Montana in these cases.

CITATIONS TO OFFICIAL AND UNOFFICIAL REPORTS

John P. Daly and Audrey M. Daly v. U.S. Bancorp Piper Jaffray Inc., et al., 2005 MT 62N, 110 P.3d 1057.

John D. Shea and Brenda Shea v. U.S. Bancorp Piper Jaffray Inc., et al., 2005 MT 63N, 110 P.3d 1057.

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James Leary v. U.S. Bancorp Piper Jaffray Inc., et al., 2005 MT 161N, ___ P.3d ___.

Each of these cases relies upon and expressly adopts the holdings and analysis set forth in *Willems v. U.S. Bancorp Piper Jaffray Inc., et al.*, 2005 MT 37, 107 P.3d 465,[3] which is one of twenty-three civil cases arising out of allegations of misconduct by Mr. O'Neill with respect to the accounts of the respective plaintiffs.

[3] The *Willems* case has been settled and therefore no Petition is being filed with respect to that case.

JURISDICTION

Judgment was entered in *Daly* and *Shea* on March 15, 2005; in *Franey* on March 22, 2005; in *Emett* on April 19, 2005; in *Berryman* on May 5, 2005; and in *Leary* on June 28, 2005.

Justice O'Connor granted an extension of time up to and including July 13, 2005 to file the Petition for Writ of Certiorari in *Daly* and *Shea* on May 18, 2005.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Commerce Clause, U.S. Const., art. 1, § 8, cl. 3:

The Congress shall have the Power . . .

To regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.

Federal Arbitration Act, 9 U.S.C. § 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

STATEMENT OF THE CASE

This consolidated Petition requests this Court's review of decisions of the Montana Supreme Court in six of twenty-three actions[4] against Piper Jaffray which allege generally that Mr. O'Neill, a former Account Executive in the Butte, Montana Branch Office of Piper Jaffray, had engaged in improper conduct with respect to the accounts of the plaintiffs in each of the twenty-three lawsuits.[5]

Each of the Respondents here had executed one or more account agreements containing a pre-dispute arbitration provision. The provision conforms to the language required by the securities industry self-regulatory organizations such as the New York Stock Exchange, Inc. ("NYSE") and the National Association of Securities Dealers, Inc. ("NASD") and is typical of arbitration provisions found in virtually every customer account agreement used in the securities industry throughout the United States. For example, the Sheas executed agreements when they opened an IRA account and their joint account. (The various agreements signed by the Respondents are collectively referred to as the "Account Agreements.") In pertinent part, the IRA Agreement provides:

---

[4] The twenty-three lawsuits, and the status of each, may be found in the Appendix at 65.

[5] On January 12, 2005, Mr. O'Neill pled guilty to two counts of unauthorized trading in the accounts of two (2) clients with whom Piper Jaffray has reached settlements. Mr. O'Neill was sentenced on April 29, 2005. He is required to make restitution to Piper Jaffray in the amount of $308,000, representing amounts which Piper Jaffray paid into a restitution fund as part of the settlement with the Montana Securities Department arising out of O'Neill's alleged misconduct.

> **.... I agree to arbitrate any disputes between Piper Jaffray and me. I specifically agree and recognize that all controversies which may arise between Piper Jaffray, its agents, representatives or employees and me, concerning any transaction, account or the construction, performance or breach of this or any other agreement between Piper Jaffray and me, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration to the full extent provided by law....**

(Bold in original).[6] The IRA Agreement also confirms Mr. Shea's receipt of this IRA Agreement and acknowledgement of the arbitration clause in words which appear immediately above Mr. Shea's signature: **"I UNDERSTAND THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE AT PARAGRAPH 4 ABOVE, AND I ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT."** (Bold, all capital lettering in original document).

In their joint account agreement, Mr. and Mrs. Shea both entered into a contract with Piper in which they agreed that any disputes would be resolved through arbitration. The arbitration clause employed in the joint agreement is almost identical to that used in the IRA Agreement, and in pertinent part provides:

> **... You agree to arbitrate any disputes between Piper Jaffray and you. You specifically agree and recognize that all**

[6] The complete arbitration provision contained in the IRA account agreement may be found at App. 63-64.

> **controversies which may arise between Piper Jaffray, its agents, representatives or employees and you concerning any transaction, account or the construction, performance or breach of this or any other agreement between us, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration to the full extent provided by law. . . .**

(Bold in original).[7]

As with the IRA Agreement, the joint agreement also contains the Sheas' written confirmation of receipt of a copy of the agreement and acknowledgement of the arbitration provision immediately above the signature line:

> **BY SIGNING THIS AGREEMENT YOU:**
>
> . . .
>
> **2. UNDERSTAND THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE AS SHOWN ON PAGE 7, PARAGRAPH 12.**
>
> **3. ACKNOWLEDGE RECEIPT OF A COPY OF THIS AGREEMENT.**

(Bold and all capital lettering in original document).

When each plaintiff initiated litigation, Piper Jaffray invoked the arbitration provision by demanding arbitration of the plaintiff. When each plaintiff refused to arbitrate, Piper Jaffray then moved the state district court to compel arbitration. After conducting evidentiary hearings

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[7] The complete arbitration provision contained in the joint account agreement may be found at App. 61-62.

in each case, and conducting a joint hearing in which expert testimony was taken and made applicable to all twenty-three cases, the three district court judges who had various of these cases uniformly held in separate opinions for each case that the arbitration provisions were unenforceable.

A Notice of Appeal was filed in each case, except where the matter was settled before the appeal time had run. Of the twenty-three cases, these six cases have been decided but not settled; the appeal is still pending in four cases; and thirteen cases have been settled. The first decision of the Montana Supreme Court was in *Willems v. U.S. Bancorp Piper Jaffray Inc., et al.*, 2005 MT 37, 107 P.3d 465 (decided February 22, 2005). (App. 23-25).[4]

In *Willems*, the Court held that Piper Jaffray owed its customers a fiduciary duty which arose out of certain substantive provisions contained in the various Account Agreements which are consistent with federal statute and regulations. According to the Montana Supreme Court, this fiduciary duty arose even before the customers signed the agreement and that duty required Piper Jaffray to explain the arbitration provision, but only the arbitration provision, *before* the Agreement was executed. *Id.* at ¶ 24 (App. 33). The Court rejected Piper Jaffray's argument that this requirement creates a special legal standard in violation of the Federal Arbitration Act. *Id.* at ¶¶ 26-27. (App. 33-34). Although raised in Petitioners' brief below, the Montana Supreme Court never addressed the impact

[4] *Willems* had been settled in principle by Piper Jaffray shortly before the opinion was issued but before the parties had moved to dismiss the appeal as moot. As a result, *Willems* is not one of the cases for which review by this Court may be sought.

the invalidation of the arbitration provision has upon broker-dealers and their customers conducting business in interstate commerce.

Subsequently, the Montana Supreme Court issued opinions in the six cases which are the subject of this Petition. In each decision, the Court has affirmed the lower court by incorporating its opinion and analysis in *Willems*, and has rejected Piper Jaffray's arguments that the Federal Arbitration Act controls and the invalidation of the arbitration provisions at issue violates the Commerce Clause. *Daly*, *supra* at ¶¶ 3-4 (App. 2-3); *Shea*, *supra* at ¶¶ 4-5 (App. 6); *Franey*, *supra* at ¶ 3 (App. 10); *Emett*, *supra* at ¶¶ 3,5 (App. 12-13); *Berryman*, *supra* at ¶¶ 4-5 (App. 17); *Leary*, *supra* at ¶¶ 4,6 (App. 21-22).

Because of the hostility of the Montana judicial system to pre-dispute arbitration provisions generally and the import of these decisions to the viability and validity in Montana of arbitration provisions utilized by Piper Jaffray and the entire securities industry in the United States, Piper Jaffray is seeking this Court's review.

REASONS FOR GRANTING THE WRIT

Introduction

Since 1994, when the Montana Supreme Court rendered its first opinion in *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994) (*Casarotto I*), the Montana judiciary has evidenced a hostility toward arbitration and has rejected arguments that the Federal Arbitration Act pre-empts the attempts of both the Montana legislature and judiciary to

void pre-dispute arbitration agreements in matters clearly involving interstate commerce. In *Casarotto I*, a Montana statute required notice of the existence of an arbitration provision be placed on the first page of any contract containing such a provision; otherwise, the arbitration provision was invalid and unenforceable. The Montana Supreme Court held this requirement did not violate the Federal Arbitration Act. *Casarotto I*, 886 P.2d at 939. This Court granted certiorari, *decided sub nom Doctor's Associates v. Casarotto,* 515 U.S. 1129 (1995), and ordered that the judgment of the Montana Supreme Court be vacated and remanded for further consideration in light of this Court's then-recent decision, *Allied-Bruce Terminix Cos. v. Dobson,* 513 U.S. 265 (1995). Upon remand, the Montana Supreme Court affirmed its prior decision. *Casarotto v. Lombardi*, 901 P.2d 596 (Mont. 1995) (*Casarotto II*). This Court again granted certiorari and reversed the decision of the Montana Supreme Court, *decided sub nom Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), holding that the special statutory provision applicable to arbitration clauses violated the Federal Arbitration Act.

Justice Trieweiler's specially concurring opinion in *Casarotto I* provides compelling insight into the Montana Supreme Court's hostility toward the Federal Arbitration Act and well-settled law favoring arbitration as a means of dispute resolution: "I am particularly offended by the attitude of federal judges [who favor arbitration as an alternative dispute resolution mechanism which relieves crowded court dockets]. . . . [I]f the Federal Arbitration Act is to be interpreted as broadly as some of the decisions of our federal courts would suggest, then it presents a

serious issue regarding separation of powers." *Casarotto I*, 886 P.2d at 939-941.

The Montana Supreme Court's hostility toward the Federal Arbitration Act and arbitration has not abated since *Casarotto* was decided. *See, e.g., Keystone, Inc. v. Triad Systems Corp.*, 1998 MT 326, 971 P.2d 1240 (invalidating portion of arbitration clause that required parties to arbitrate disputes outside of Montana); *Iwen v. U.S. West Direct*, 1999 MT 63, 977 P.2d 989 (striking arbitration provision in advertising contract as "unconscionable"); *Kingston v. Ameritrade, Inc.*, 2000 MT 269, 12 P.3d 929 (validity of arbitration provision in an agreement to be decided by court where validity of underlying agreement not at issue); *Kloss v. Edward D. Jones*, 2002 MT 129, 54 P.3d 1, *cert. denied*, 538 U.S. 956 (2003) (arbitration provision not within the client's reasonable expectation and existence of an on-going fiduciary relationship required explanation of arbitration provision).

The Montana Supreme Court's decisions in the matters that are the subject of this Petition continue this tradition by refusing to enforce the arbitration provisions contained in the Piper Jaffray Account Agreements. Indeed, the irony of the Montana Supreme Court's opinions is not lost on Piper Jaffray: in the decisions at issue here the Montana Supreme Court has found a new rationale to invalidate arbitration provisions which are in the form and format previously required by that court. In *Mueske v. Piper, Jaffray & Hopwood, Inc.*, 859 P.2d 444 (Mont. 1993), the Montana Supreme Court invalidated an arbitration clause because the account agreement failed to provide an acknowledgement of the existence of the arbitration provision in the agreement and receipt of a copy of the agreement. Those requirements are met in the

Account Agreements at issue here. Faced with agreements and pre-dispute arbitration provisions which comply with *Mueske*, the Montana Supreme Court has created new requirements purposefully designed to invalidate the arbitration provisions.

I. The Montana Supreme Court's unique judicially imposed requirement that pre-dispute arbitration clauses commonly contained in securities industry customer agreements must be explained to the customer before the agreement is even executed, which requirement is not applied to any other contract provisions in Montana, violates the Federal Arbitration Act and frustrates the national policy of favoring arbitration as a means of dispute resolution.

It is well established that a national policy favoring arbitration is at the heart of the Federal Arbitration Act. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984); *see also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 945 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985). The *Southland* Court, in reversing the California Supreme Court, determined that section 2 of the Federal Arbitration Act applies to state court decisions and preempts conflicting state laws. *Southland, supra*, at 16. And, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), this Court held that national policy applicable to securities industry claims, stating:

> [W]e are well past the time when judicial suspicion of the desirability of arbitration and of the

> competence of arbitral tribunals should inhibit enforcement of the Act in controversies based on statutes.

Id. at 226 (citations omitted).[9]

The national policy in favor of arbitration preempts state laws that infringe upon the domain Congress encompassed within the Federal Arbitration Act. For example, in *Perry v. Thomas*, 482 U.S. 483 (1987), this Court held that section 2 of the Federal Arbitration Act preempted a provision of the California Labor Code that permitted court actions to collect wages, notwithstanding any private agreement to arbitrate such a dispute. In dicta, the *Perry* Court stated that a court may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot." *Perry*, *supra*, at 492 n. 9.

In the instant cases, the Montana Supreme Court has done precisely what this Court counseled against in *Perry* by holding pre-dispute arbitration provisions to higher or different standards than other provisions in the contracts. It has taken a substantive provision of the Account Agreement, which only is effective *after* the contract has been formed, and has held that this post-formation provision creates a fiduciary duty which, in turn, requires Piper Jaffray to explain only the arbitration provision to its

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[9] Correspondingly, prior Montana law also provides a state policy favoring arbitration. *Chor v. Piper, Jaffray & Hopwood, Inc.*, 862 P.2d 26, 29 (Mont. 1993); *Vukasin v. D.A. Davidson & Co.*, 785 P.2d 713, 718 (Mont. 1990).

clients prior to execution of the agreement.[10] In so holding, the Montana Supreme Court ignores the clear holding of *Doctor's Associates, Inc. v. Casarotto*, *supra*, and the dicta in *Perry*, *supra*, by subjecting an arbitration clause to a fundamentally different legal standard than applied to any other contract provision. This violates the Federal Arbitration Act.

Section 2 of the Federal Arbitration Act "makes enforceable a written arbitration provision in 'a contract *evidencing* a transaction *involving* commerce.' 9 U.S.C. § 2." *Allied-Bruce*, *supra*, at 268 (emphasis in original). As this Court further explained, section 2 also allows states to "regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Id.* at 281 (citation omitted).

In the cases at bar, the Montana Supreme Court has created a heightened burden for the arbitration provisions than for the rest of the contract provisions. To do so, it interpreted the following language contained in the Account Agreements to find that this provision created a fiduciary duty even *before* the agreement is signed by the customers:

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[10] None of the decisions provides any clue as to how this explanation is to be provided or memorialized. Are *Miranda*-type warnings required? Must the explanation be in writing? Must it be recorded? Does it require the client to sign a separate document acknowledging that the explanation had been provided?

Customer's Orders Binding Until Notice of Death

Upon your death or failure to comply with any part of this Agreement or whenever Piper Jaffray deems it necessary for its protection, Piper Jaffray is authorized (but is not required) to:

-Cancel outstanding orders;

-Purchase, sell, assign, receive and deliver all or any part of the securities held or carried for you; and

-Close out short sales by purchase upon any exchanged board or market any public or private sale at Piper Jaffray's option.

Willems, supra ¶ 17 (App. 29-30).

This position completely ignores the fact that the contracts at issue clearly and specifically advise the client of the existence of the arbitration provision. The arbitration notice is found above the signature block and provides that, by signing the Account Agreement, the customer acknowledges the existence of the arbitration clause. The language on the signature page of each Account Agreement clearly and unambiguously informs the customer that the Account Agreements contain arbitration clauses and acknowledges receipt of the agreement. The notice provision is generally in all capital and bold lettering, and directs the signer to the location of the arbitration provision in the Account Agreement. Therefore, any customers who sign the signature page of any Account Agreement can not do so without first seeing the arbitration notice provision which clearly refers to the arbitration clause. Finally, and importantly, the language used in both the arbitration clause and the notice provision has been

approved by the Securities Exchange Commission ("SEC") and is consistent with the requirements imposed by both the NYSE and NASD.

Notwithstanding these undisputed facts, the Montana Supreme Court, as its only basis for voiding the arbitration provision, held that Piper had a fiduciary obligation to explain the arbitration provision to each customer *before* the Account Agreement was executed. This stands contract law on its head and creates a special requirement applicable only to arbitration provisions.

Montana contract law acknowledges that a written contract is only effective at delivery – not prior to delivery and certainly not prior to execution. *See, generally,* Mont. Code Ann. § 28-2-906. It also recognizes that a party to a contract is generally bound by all terms of the contract, regardless of which terms were read. *See, generally, Wiley v. Iverson*, 1999 MT 214, 985 P.2d 1176, 1181; see also, *Schlemmer v. North Central Life Co.*, 2001 MT 256, 37 P.3d 63, 65 (where language in an insurance application is clear and unambiguous, plaintiff did not deny signing it, and contract has notation directly above signature block attesting to signatory's understanding of the document, plaintiff's professed claim of ignorance as to the application's contents "cannot prevail.") Furthermore, Montana law provides there is no fiduciary duty between an investment advisor and his or her client absent a grant of discretionary authority. *See Chor, supra*, 862 P.2d at 32.

The decisions below do not require Piper to explain any other term or condition in the Account Agreement before execution, including the terms which the Court below found created the fiduciary duty. The arbitration

provision is thus impermissibly singled out and treated like no other provision. This requirement is as offensive and impermissible as the statutory requirement stricken in *Doctor's Associates, supra*, 517 U.S. 681, that notice of the existence of the arbitration provision be provided on the first page of the agreement.

In addition, the substantive provision which the Montana Supreme Court found created this fiduciary duty has its roots in federal statutes and regulations and is found in virtually every securities industry customer agreement. The Montana Supreme Court found that this provision gives Piper Jaffray discretion to buy and sell in the plaintiffs' accounts, thereby creating a fiduciary duty on the part of Piper Jaffray to explain the arbitration clause to the plaintiffs. *Willems, supra* ¶ 22 (App. 32).

Piper Jaffray, however, did not have discretion to buy and sell securities in plaintiffs' accounts.[11] Piper Jaffray's "discretion" was constrained in two ways: (1) Piper Jaffray could only act in three discrete situations; and, (2) when it did act, Piper Jaffray was constrained by an implicit requirement that it do so in good faith and in a commercially reasonable manner. Accordingly, the Montana Supreme Court's finding that "Piper's brokers [had] discretion to buy and sell securities," *Willems, supra* ¶ 22 (App. 32), is erroneous.

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[11] It is important to note that the plaintiffs' non-IRA accounts were margin accounts in which the Plaintiffs were able to use the securities in the accounts as collateral to obtain loans to purchase stock. The language permitting Piper to act without customer approval was in the context of protecting Piper when the risk from the customers' accounts became excessive.

In the context of a margin account, like those at issue in this case,[12] the language the Montana Supreme Court relied upon to find a fiduciary duty merely provides protection to Piper Jaffray in specific situations.[13] Piper Jaffray is allowed to act in only three very specific situations: (1) when the customer dies; (2) when the customer breaches the contract; or, (3) when Piper Jaffray deems it necessary to liquidate the account for its protection. *See Willems, supra* ¶ 17 (App. 29). It is the third situation that the Court below relied upon to determine that Piper Jaffray's limited contractual right to take appropriate action under narrowly defined circumstances somehow makes it a fiduciary. This finding is erroneous.

The purpose of such language "is to protect brokers from the risks associated with insufficiently secured accounts, and to prevent customers from carrying vast exposure in their accounts without adequate capital to cover their positions." *Pomano-Windy City Partners, Ltd. v. Bear Stearns & Co., Inc.*, 794 F. Supp. 1265, 1275 (S.D.N.Y. 1992) (citations omitted). As Justice Powell

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[12] Interestingly, Mr. Leary, one of the plaintiffs below, testified that he did not have a margin account, but only had an IRA account and was only suing with regard to that IRA account. See Hearing Transcript dated February 26, 2003, pp. 11-12 (App. 58-60). The contracts governing the IRA accounts offered by Piper Jaffray did not contain the language the Montana Supreme Court found to be discretionary, as IRA accounts are not permitted to be on margin.

[13] If a customer's margin gets out of balance (*i.e.* if the value of the loan departs from certain constraints compared to the value of the securities in the account), Piper's exposure in the event of a default by the customer gets too excessive and threatens to harm Piper. Piper is carrying too much risk. Therefore, Piper is entitled to either require additional money be added to the account (through a margin call) or to buy or sell in the account to eliminate the risk (*i.e.* to liquidate the account).

stated, sitting by designation in the Fourth Circuit and interpreting similar language, "A brokerage house should not have to risk a nearly unlimited amount of its own funds while waiting [for a client to] to meet a margin call." *Prudential-Bache Securities, Inc. v. Stricklin*, 890 F.2d 704, 707 (4th Cir. 1989).[14]

The brokerage firm's discretion to increase the margin or to initiate a margin call "must be exercised in good faith." *Modern Settings, Inc. v. Prudential-Bache Securities, Inc.*, 936 F.2d 640, 644 (2nd Cir. 1991). "A margin call is made in bad faith when it is 'contrived . . . in bad faith to penalize [the customer] for some reason unrelated to [the broker's] business.'" *Capital Options Investments, Inc. v. Goldberg Brothers Commodities, Inc.*, No. 88 C 2073, 1990 WL 180583, *5 (N.D. Ill. Nov. 5, 1990) (citations omitted) (alterations in original). Accordingly, and in contradiction to the Montana Supreme Court, Piper Jaffray did not have absolute discretion to initiate a

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[14] The language in that contract was very similar to the language in the Piper contracts at issue in this matter and read:

> Whenever in your [appellee's] discretion you deem it desirable for your protection (and without the necessity of a margin call) . . . you may, without prior demand, tender, and without any notice of the time or place of sale, all of which are expressly waived, . . . buy any securities, or commodities or contracts relating thereto of which my account or accounts may be short, in order to close out in whole or in part any commitment in my behalf . . . and neither any demands, calls, tenders or notices which you may make or give in any one or more instances nor any prior course of conduct or dealings between us shall invalidate the aforesaid waivers on my part.

Prudential-Bache, 890 F.2d at 706.

margin call or to liquidate the account upon a determination that it was in its best interests to do so. *See Modern Settings*, *supra*, 936 F.2d at 644 (holding that a brokerage did not have "absolute discretion" to liquidate because it must make this decision in good faith).

Similarly, Piper Jaffray, after determining that liquidation of the account was necessary, would also be constrained to do so "in good faith and in a commercially reasonable manner." *In re Kaplan*, 143 F.3d 807, 818 (3rd Cir. 1998). Liquidating in a commercially reasonable manner means to mitigate the damages of the client. *See Agra, Gill & Duffus, Inc. v. Benson*, 920 F.2d 1173, 1177 (4th Cir. 1990) ("overriding the broker's discretion to select the manner of liquidation was its duty to mitigate [the client's] damages, which in this context meant to liquidate in a commercially reasonable manner."). *See also Cauble v. Mabon Nugent & Co.*, 594 F. Supp. 985, 992 (S.D.N.Y. 1984) (in commodities case, holding that "broker does not have unbridled discretion to liquidate an account; its power to liquidate must be exercised in good faith under the existing facts and circumstances").

Because Piper Jaffray's actions were constrained by the duty to act (1) in good faith, and, (2) in a commercially reasonable manner in deciding when and how to liquidate the accounts, Piper Jaffray did not have discretion over the plaintiffs' accounts as the Montana Supreme Court found. Therefore, its holding and analysis that Piper Jaffray somehow owed the plaintiffs a fiduciary duty are without legal or factual support because Piper Jaffray did not have unfettered discretion to buy and sell securities in their accounts.

The inescapable conclusion is that the Montana Supreme Court, in its hostility to arbitration, has seized upon a unique interpretation of principles of contract law to void the arbitration clauses, and only the arbitration clauses, in the plaintiffs' contracts. This Court has unequivocally held that the Federal Arbitration Act "makes any such state policy unlawful, for that kind of policy would place arbitration clauses in an 'unequal footing' directly contrary to the Act's language and Congress' intent." *Allied-Bruce, supra* at 281. In this case, arbitration is not only disfavored, but effectively barred from any use by the securities industry based upon a unique and result-oriented judicial interpretation of principles of contract law to find the arbitration clause unenforceable. A Writ of Certiorari should be issued here expressly because these decisions are directly contrary to this Court's precedent.

II. The Montana Supreme Court's wholesale invalidation of pre-dispute arbitration clauses common in the securities industry is out of step with the majority of state courts which routinely enforce arbitration clauses contained within customer agreements in the securities industry.

It is beyond dispute that the securities industry generally, and the relationship between broker-dealers and their customers in particular, are matters in interstate commerce, 15 U.S.C. § 78(b)(1), and thus come within the Federal Arbitration Act. In this instance, the decisions of the Montana Supreme Court at issue here interfere with the arrangement between broker-dealers located in other

states and their Montana customers who are investors in national securities markets. Firms like Piper Jaffray, operating as broker-dealers in the heavily regulated securities industry, routinely rely upon unilaterally drafted customer contracts. In fact, the SEC requires firms to use certain language in its arbitration provisions, which language is set forth in Rule 3110 of the NASD Manual. These contracts are executed by broker-dealers and their customers throughout the country.

There is a reasonable expectation that arbitration clauses are found in agreements between broker-dealers and their clients. Indeed, prior to these Montana decisions, this expectation has been part of Montana contract law and has been discussed in connection with arbitration clauses in brokerage agreements. See, *Passage v. Prudential-Bache Securities Inc.*, 727 P.2d 1298, 1302 (Mont. 1986) ("Such predispute arbitration agreements are not outside the reasonable expectations of the investor." (citing *Finkle and Ross v. A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505, 1511-12 (S.D.N.Y. 1985)).

The prevalence and the use of arbitration in the securities industry is evidenced by recent statistics published by the NASD, one of the self-regulatory organizations to which Piper Jaffray belongs, and one whose arbitration rules are specifically referenced in the arbitration provision at issue here. In the last five years alone the NASD has administered over 33,000 arbitrations. During that time, of those claims decided by NASD arbitration panels, approximately 55% resulted in awards in favor of the investor. In 2004 alone, the NASD administered over 9,000 arbitrations.

Not only are pre-dispute arbitration provisions usually and customarily employed in the securities industry, but their use has been acknowledged and accepted by this Court as a legitimate and fundamentally fair means of resolving disputes between broker-dealers and their customers. *Shearson/American Express, Inc.*, 482 U.S. at 237. In fact, Montana law prior to the *Casarotto* decisions, held that "agreement[s] to arbitrate disputes in accordance with SEC-approved procedures are not unconscionable as a matter of law." *Chor*, 862 P.2d at 30 (*citing Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286 (9th Cir. 1988) (overruled on other grounds)).

Indeed, virtually all other states recognize the enforceability of pre-dispute arbitration provisions in contracts between broker-dealers and their clients. *See, e.g.*, *American Ins. Co. v. Cazort*, 871 S.W.2d 575 (Ark. 1994) (Holding that the issuer could compel the investor into arbitration even though the issuer was not a signatory to the arbitration agreement between the investor and the broker); *Macaulay v. Norlander*, 15 Cal.Rptr.2d 204, 207 (Cal. Ct. App. 1992) ("Respondents, like other Sutro clients, were bound by the provisions of the client agreement regardless of whether they read it or were aware of the arbitration clause when they signed the document."); *Eychner v. Van Vleet*, 870 P.2d 486 (Colo. Ct. App. 1993) (Holding that if initial transactions involved investment firm accounts, all transactions would be subject to arbitration.); *Fairview Cemetery Assoc. v. Eckberg*, 385 N.W.2d 812, 821 (Minn. 1986) (Held that the investor's "Minnesota Blue Sky Law and related common law claims are therefore subject to arbitration."); *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 727 (Miss. 2001) ("Further, the arbitration

provisions survive the death of Hilliard and the termination of the agreements and bind Henry as a successor of Hilliard."); *State ex rel. PaineWebber, Inc. v. Voorhees*, 891 S.W.2d 126, 130 (Mo. 1995) ("Arbitration Act requires a court to stay a lawsuit pending arbitration where as here the parties agree in writing to arbitrate a dispute from a contract that involves commerce."); *Blount v. Smith Barney Shearson, Inc.*, 695 So. 2d 1001 (La. Ct. App. 1997) (Court required arbitration pursuant to arbitration clause despite claims by investors that they had not read the terms of the account agreements and the broker did not explain their terms.).[15]

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[15] *See, also, Investment Management & Research, Inc. v. Hamilton*, 727 So. 2d 71, 78 (Ala. 1999) ("Because Hamilton claimed fraud in the inducement of the customer-agreement contract generally, as opposed to the arbitration clause specifically, Hamilton's claims against IMR are subject to arbitration according to the terms of the customer agreement he signed."); *Rocz v. Drexel Burnham Lambert, Inc.*, 743 P.2d 971, 976 (Ariz. Ct. App. 1987) ("Absent an ambiguity in the arbitration provision, and absent oppressive or unconscionable terms, we presume that Rocz assented to the arbitration terms that she should have reasonably expected to be included in this securities contract. We therefore reject Rocz's argument that the arbitration provision is unenforceable on legal or equitable grounds."); *Salomon Smith Barney, Inc. v. Cotrone*, 841 A.2d 1199 (Conn. App. Ct. 2004) (Compelling the investor into arbitration even though he did not sign the entire arbitration agreement); *Oppenheimer & Co., Inc. v. Young*, 475 So. 2d 221 (Fla. 1985) (Approving broker's right to arbitration of dispute pursuant to arbitration clause even though broker did not pointlessly invoke the arbitration agreement in a prior federal court action); *Comvest, L.L.C. v. Corporate Securities Group, Inc.*, 507 S.E.2d 21, 24 (Ga. Ct. App. 1998) (Holding that the securities purchaser was bound by arbitration agreement even though it did not sign the agreement.); *Nelson for Soller v. Roger J. Lange & Co., Inc.*, 594 N.E.2d 391, 393 (Ill. App. Ct. 1992) ("We find this arbitration clause to be broad enough to require that the claim of fraud in the inducement be submitted to arbitration."); *Commonwealth Equity Services, Inc. v. Messick*, 831 A.2d 1144, 1152 (Md. Ct. Spec. App. 2003) (Holding that Maryland law favors compelling arbitration as long

(Continued on following page)

as there is a valid arbitration agreement and the parties have not waived the right to arbitrate.); *Loche v. Dean Witter Reynolds, Inc.*, 526 N.E.2d 1296, 1300 (Mass. App. Ct. 1988) (Holding that investor's claims against firm, based on allegations of fraud, conversion and misrepresentation, were subject to arbitration under Federal Arbitration Act.); *Bennett v. Shearson Lehman-American Exp., Inc.*, 423 N.W.2d 911 (Mich. App. Ct. 1987) (Holding that brokerage firm's delay in seeking arbitration while attempting to resolve dispute with customers over firm's handling of customers' brokerage account did not preclude firm from seeking to arbitrate dispute under arbitration provision in customers' contract after customers filed complaint.); *Young v. Prudential Securities, Inc.*, 891 S.W.2d 842, 845 (Mo. App. Ct. 1995) ("Plaintiffs admitted they executed the arbitration agreements, they have alleged nothing which casts doubt on the validity of those agreements, they have refused to arbitrate and the defendants have applied for an order to compel arbitration. The court was required to grant that application."); *Jansen v. Salomon Smith Barney, Inc.*, 776 A.2d 816, 821 (N.J. Super. Ct. App. Div. 2001) ("Although plaintiffs did not sign the arbitration provision, they were the intended successors to Jansen's interest in the accounts. They are thus bound by the arbitration clause."); *Alexander v. Calton & Associates, Inc.*, 110 P.3d 509, 510 (N.M. Ct. App. 2005) ("[T]he district court is compelled to order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate."); *Park v. Merrill Lynch*, 582 S.E.2d 375, 378 (N.C. Ct. App. 2003) ("Securities brokerage agreements are contracts 'involving' interstate commerce and, therefore, the FAA applies to them"); *Dowd v. First Omaha Securities Corp.*, 495 N.W.2d 36 (Neb. 1993) (Requiring arbitration of dispute, despite plaintiff's challenge of the impartiality of the arbitration panel); *Financial Network Investment Corp. v. Becker*, 741 N.Y.S.2d 837, 838 (N.Y. Sup. Ct. 2002) ("When valid arbitration agreement covering the dispute is shown, arbitration is required"); *David v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 440 N.W.2d 269, 275 (N.D. 1989) ("We conclude that the arbitration agreement is applicable to David's claims against Williams and Merrill Lynch Commodities, Inc."); *Featherstone v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 822 N.E.2d 841 (Ohio Ct. App. 2004) (" 'Unless it may be said with positive assurance that the subject arbitration clause is not susceptible to an interpretation that covers the asserted dispute,' a court should require arbitration according to the contract"); *Dean Witter Reynolds, Inc. v. Shear*, 796 P.2d 296, 302 (Okla. 1990) (concurring opinion) ("[P]arties to a commodities contract [should] be allowed to *knowingly* and *intentionally* waive the right to trial by jury by

(Continued on following page)

In summary, granting the Writ of Certiorari is appropriate here because the decisions below are out of step with virtually every other state which enforces pre-dispute arbitration provisions in the securities industry; and, because they are an anomaly, the Montana decisions threaten to disrupt the operations of the industry as a whole since Montana-only account agreements and procedures would be required to be implemented by broker-dealers operating in a national securities market.

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agreeing to submit contractual controversies to arbitration.") (emphasis in original); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860, 867 (Pa. Super. Ct. 1991) ("Given the three paths down which this litigation can be directed – compelled individual arbitration, class action in a court of law, or compelled classwide arbitration – the last choice best serves the dual interest of respecting and advancing contractually agreed upon arbitration agreements while allowing individuals who believe they have been wronged to have an economically feasible route to get injunctive relief from large institutions employing adhesion contracts."); *Carlsten v. Oscar Gruss & Son, Inc.*, 853 A.2d 1191, 1194 (R.I. 2004) ("[P]arties who voluntarily contract to use arbitration as an expeditious and informal means of private dispute resolution are bound by the terms of their agreement."); *Cantella & Co., Inc. v. Goodwin*, 924 S.W.2d 943, 944 (Tex. 1996) ("Once a party seeking to compel arbitration establishes that an agreement exists under the FAA, and that the claims raised are within the agreement's scope, the trial court 'has no discretion but to compel arbitration and stay its proceedings pending arbitration.'"); *Garmo v. Dean, Witter, Reynolds, Inc.*, 681 P.2d 253, 255 (Wash. 1984) ("We hold that the supremacy clause of the federal constitution prevails and, thus, the federal arbitration law requires enforcement of arbitration clauses in brokerage agreements.").

III. The Montana Supreme Court's wholesale invalidation of pre-dispute arbitration provisions common in the securities industry impermissibly interferes with the relationship between broker-dealers and their customers in interstate commerce and thus violates the Commerce Clause.

The United States Constitution gives Congress alone the power "[t]o regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8, cl. 3. Under this clause, Congress "is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." *Pierce County, Wash. v. Guillen*, 537 U.S. 129, 147 (2003), *citing United States v. Lopez*, 514 U.S. 549, 558 (1995) (citations omitted).

Even in areas where Congress has not exercised this authority, state regulations may violate the Commerce Clause either because the regulations discriminate against interstate or foreign commerce, or because they incidentally affect such commerce. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine, et al.*, 520 U.S. 564 (1997). Discrimination against interstate commerce can be evident either on a statute's face, or in its practical effect. *See, e.g., Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992). As explained by this Court over fifty years ago:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from

> every producing area in the Nation to protect him from exploitation by any. Such was the intent of the Founders; such has been the doctrine of this Court which has given it reality.

H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

Here, the practical effect of the Montana Supreme Court's decisions is to create a situation whereby firms, such as Piper Jaffray, which conduct business in interstate commerce and routinely utilize unilaterally drafted contracts whose terms are influenced and governed by federal statutes and regulations and whose arbitration provisions are approved by the SEC and the self-regulatory organizations, such as the NYSE and the NASD, will not be able to rely upon such contracts if executed in Montana by Montana clients. However, such contracts are valid everywhere else in the United States. The decision also calls into doubt the enforceability of such provisions if a customer with an existing arbitration agreement moves to Montana, or moves from Montana to another state. This impairs free access to the state of Montana by Piper Jaffray as only customer contracts without arbitration clauses are seemingly permissible. This undue restriction on choice of dispute resolution and, indeed, the freedom to contract is in violation of the Federal Arbitration Act, and only serves to impair the contract rights of firms such as Piper Jaffray seeking to bring access to the various national securities markets and exchanges to Montana. The decisions below thus operate an undue and substantial burden on interstate commerce and, in practical effect, violate the Commerce Clause.

The result of this unique propensity of the Montana judiciary to void arbitration agreements in Montana is a

disruption of the course of business in the national securities markets. This result offends the Commerce Clause by impeding interstate commerce and, as noted above, is out of step with virtually every other jurisdiction which recognizes the enforceability of arbitration clauses in the securities industry.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari to the Montana Supreme Court be issued.

Respectfully submitted this 13th day of July 2005.

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No. _____

In The

Supreme Court of the United States

PIPER JAFFRAY & CO. and
ROBERT ENGLISH et al.,

Petitioners,

v.

JOHN P. DALY, AUDREY M. DALY, JOHN D. SHEA,
BRENDA SHEA, THE ESTATE OF ALICE A. FRANEY,
ROBERTA J. EMETT, KATHLEEN E. MERRETT,
VICKI BERRYMAN, and JAMES LEARY,

Respondents.

APPENDIX

App. 1

No. 04-490

IN THE SUPREME COURT OF THE STATE OF MONTANA

2005 MT 62N

JOHN P. DALY and AUDREY M. DALY,

Plaintiffs and Respondents,

v.

U.S. BANCORP PIPER JAFFRAY, INC., and THOMAS J. O'NEILL, and JOHN DOES I through X,

Defendants and Appellants.

(Filed Mar. 15, 2005)

APPEAL FROM:
The District Court of the Second Judicial District,
In and For the County of Silver Bow, Cause No. DV 2002-14
Honorable Thomas M. McKittrick, Presiding Judge.

COUNSEL OF RECORD:

For Appellants:

Stanley T. Kaleczyc and Brand Boyar, Browning, Kaleczyc, Berry & Hoven, Helena, Montana

John S. Lutz, Fairfield & Woods, Denver, Colorado (U.S. Bancorp)

For Respondent:

William P. Joyce, Joyce & Johnston, Butte, Montana

Robert J. Phillips, Phillips & Bohyer, Missoula, Montana

Submitted on Briefs: January 4, 2005
Decided: March 15, 2005

Filed:

Ed Smith
Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent. It shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by case title, Supreme Court cause number, and result to the State Reporter Publishing Company and to West Group in the quarterly table of noncitable cases issued by this Court.

¶2 This case is one of 23 different actions against U.S. Bancorp Piper Jaffray, Inc. (Piper), involving the alleged mismanagement of accounts in the corporation's Butte office. This particular action involves a form Ms. Daly signed in 1993. The form was mailed to her with instructions that she sign the form in two places and then mail it back to Piper. She spoke to defendant O'Neill over the phone about these forms, and O'Neill, who was then a Piper employee, advised her to sign it and did not explain to her that by signing the form she was agreeing to an arbitration clause. Ms. Daly signed the form, but only in one of the two signature blocks. She and Mr. Daly signed in the final signature block, but not in the block next to the arbitration clause.

¶3 These facts and the issues arising from them are substantially identical to those in *Willems v. U.S. Bancorp*

Piper Jaffray, Inc., 2005 MT 37, ¶ 22, 326 Mont. 103, ¶ 22, ___ P.3d ___, ¶ 22. That case held that a clause granting Piper broad discretion over an investor's holdings created a fiduciary duty. That clause, in addition to the arbitration clause, was also part of the Dalys' 1993 form. *Willems* further held that because of the fiduciary duty, Piper was obligated to advise the investor of the arbitration clause, and that because Piper did not, the arbitration clause was unenforceable. *Willems*, ¶ 25.

¶4 The Dalys argue that because they did not sign the signature box next to the arbitration clause they are not bound by its terms. We need not address that contention. Even if they had signed that clause they would have entered into a fiduciary relationship with Piper, and Piper still would have had the duty of explaining the impact of the arbitration clause to them. Therefore, in light of *Willems*, we affirm the District Court's conclusion that Piper owed a fiduciary duty to explain the arbitration provision to the Dalys, that it breached that duty, and therefore that the pre-dispute arbitration provisions are unenforceable.

/s/ W. William Leaphart
Justice

We Concur:

/s/ Patricia Cotter

/s/ Jim Rice

/s/ James C. Nelson

/s/ John Warner
Justices

App. 4

No. 04-451

IN THE SUPREME COURT OF THE STATE OF MONTANA

2005 MT 63N

JOHN D. SHEA and BRENDA SHEA,

Plaintiffs and Respondents,

v.

THOMAS J. O'NEILL, ROBERT ENGLISH, U.S. BANCORP PIPER JAFFRAY and JOHN DOES, I-X,

Defendants and Appellants.

(Filed Mar. 15, 2005)

APPEAL FROM:

District Court of the Second Judicial District,
In and for the County of Silver Bow, Cause No. DV 2002-207
The Honorable Kurt D. Krueger, Judge presiding.

COUNSEL OF RECORD:

For Appellants:

Stanley Kaleczyc and Brand Boyer, Browning Kaleczyc Berry & Hoven, Helena, Montana, John S. Lutz, Fairfield & Woods, Denver, Colorado (Counsel for U.S. Bancorp and Robert English); Robert J. Phillips, Phillips & Bohyer, Missoula, Montana (counsel for Thomas O'Neill)

For Respondents:

Gregory Skakles, Skakles & Gallagher, Anaconda, Montana

Submitted on Briefs: January 19, 2005
Decided: March 15, 2005

Filed:

Ed Smith
Clerk

Justice James C. Nelson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent but shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by case title, Supreme Court cause number and result to the State Reporter Publishing Company and to West Group in the quarterly table of noncitable cases issued by this Court.

¶2 This case is one of 23 different lawsuits filed by individual investors against Thomas J. O'Neill (O'Neill), Robert English (English), and U.S. Bancorp Piper Jaffray, Inc. (Piper), involving the alleged mismanagement of accounts in Piper's branch office in Butte. This particular action involves two agreements John and Brenda Shea (the Sheas) entered into with Piper. In October 1994, the Sheas met with O'Neill, who at the time was a Piper employee, to open a Self-Directed IRA with Piper. The Sheas' meeting with O'Neill lasted 20 or 30 minutes, but during that time, O'Neill never explained to the Sheas any of the terms of the agreement that John Shea signed, nor did O'Neill inform the Sheas that the agreement contained an arbitration clause. In addition, the Sheas were never given a copy of the agreement.

¶3 In March 1998, the Sheas opened another account with Piper through O'Neill. However, neither of the Sheas met with O'Neill when they signed the agreement for this account. Instead, a receptionist provided the document to them for their signatures, but again they were not given any explanation concerning the terms of the agreement, nor were they given a copy of the agreement. The agreement for this account also contained an arbitration clause.

¶4 These facts and the issues arising from them are substantially identical to those in *Willems v. U.S. Bancorp Piper Jaffray, Inc.*, 2005 MT 37, 326 Mont. 103, ___ P.3d ___. In that case, we held that a clause granting Piper broad discretion over an investor's holdings created a fiduciary duty. *Willems*, ¶ 22. That clause, in addition to the arbitration clause, was included in the Sheas' March 1998 agreement with Piper. *Willems* further held that because of the fiduciary duty, Piper was obligated to advise the investor of the arbitration clause, and that because Piper did not, the arbitration clause was unenforceable. *Willems*, ¶ 25.

¶5 Accordingly, in light of *Willems*, we affirm the District Court's conclusion that Piper owed a fiduciary duty to explain the arbitration provision to the Sheas, that it breached that duty and, therefore, that the pre-dispute arbitration provisions are unenforceable.

¶6 Affirmed.

/s/ James C. Nelson
Justice

We Concur:

/s/ Jim Rice

/s/ W. William Leaphart

/s/ Patricia Cotter

/s/ Brian Morris

Justices

No. 04-493

IN THE SUPREME COURT OF THE STATE OF MONTANA

2005 MT 73N

THE ESTATE OF ALICE E. FRANEY,

Plaintiff and Respondent,

v.

U.S. BANCORP PIPER JAFFRAY, INC., and THOMAS J. O'NEILL, ROBERT ENGLISH, and JOHN DOES, I through X,

Defendants and Appellants.

(Filed Mar. 22, 2005)

APPEAL FROM:

The District Court of the Second Judicial District,
In and For the County of Silver Bow, Cause No. DV 2002-36
The Honorable Thomas M. McKittrick, Presiding Judge

COUNSEL OF RECORD:

For Appellants:

Stanley Kaleczyc and Brand G. Boyar, Browning, Kaleczyc, Berry & Hoven, Helena, Montana

John S. Lutz, Fairfield & Woods, Denver, Colorado

For Respondent:

William P. Joyce, Joyce & Johnson, Butte, Montana

Robert J. Phillips, Phillips & Bohyer, Missoula, Montana

Submitted on Briefs: January 4, 2005
Decided: March 22, 2005

Filed:

Ed Smith
Clerk

Justice W. William Leaphart delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent. It shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by case title, Supreme Court cause number, and result to the State Reporter Publishing Company and to West Group in the quarterly table of noncitable cases issued by this Court.

¶2 This case is one of 23 different actions against U.S. Bancorp Piper Jaffray, Inc. (Piper), involving the alleged mismanagement of accounts in the corporation's Butte office. This particular action involves a form that Piper alleges Alice Franey signed in 1994. If the form was signed, it converted her Piper Automatic Transfer (PAT) Account (opened in 1991) into a PAT Plus Account. The type of form alleged is the same as that at issue in *Willems v. US. Bancorp Piper Jaffray, Inc.*, 2005 MT 37, ¶ 17, 326 Mont. 103, ¶ 17, ___ P.3d ___, ¶ 17. The PAT Plus Account form included a clause granting Piper broad discretion over an investor's holdings, as well as an arbitration clause. In *Willems* we held that the former clause created a fiduciary duty to inform the investor of the arbitration clause.

¶3 Franey died before this trial commenced. However, at trial Piper presented no evidence that it informed Franey of the arbitration clause. Therefore, in light of *Willems*, we affirm the District Court's conclusion that even if Franey signed a PAT Plus Account form, Piper owed her a fiduciary duty to explain the impact of the arbitration provision, that Piper breached that duty, and therefore the predispute arbitration provisions are unenforceable.

¶4 We affirm the judgment of the District Court.

/s/ W. William Leaphart
Justice

We Concur:

/s/ John Warner

/s/ Patricia Cotter

/s/ James C. Nelson

/s/ Jim Rice
Justices

No. 04-517

IN THE SUPREME COURT OF THE STATE OF MONTANA

2005 MT 94N

ROBERTA J. EMETT and
KATHLEEN E. MERRETT,

Plaintiff and Respondent,

v.

U.S. BANCORP PIPER JAFFRAY, INC., PIPER JAFFRAY, INC., THOMAS J. O'NEILL, and ROBERT ENGLISH,

Defendants and Appellants.

(Filed April 19, 2005)

APPEAL FROM:
The District Court of the Second Judicial District,
In and For the County of Silver Bow, Cause No. DV 2002-29
The Honorable Thomas M. McKittrick, Presiding Judge

COUNSEL OF RECORD:
For Appellants:

Stanley Kaleczyc and Brand G. Boyar, Browning, Kaleczyc, Berry & Hoven, Helena, Montana

John S. Lutz, Fairfield & Woods, Denver, Colorado

For Respondent:

Donald Robinson and Lisa Levert, Poore, Roth & Robinson, Butte, Montana

Robert J. Phillips and John F. Haffey, Phillips & Bohyer, Missoula, Montana

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Submitted on Briefs: March 23, 2005
Decided: April 19, 2005

Filed:

Ed Smith
Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent. It shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by case title, Supreme Court cause number and result to the State Reporter Publishing Company and to West Group in the quarterly table of noncitable cases issued by this Court.

¶2 U.S. Bancorp Piper Jaffray Inc., Piper Jaffray, Inc., and Robert English (Piper) appeal from the District Court's denial of their motion to compel arbitration of the claims filed by Plaintiffs Roberta J. Emett and Kathleen E. Merrett, who are the Respondents herein. We affirm.

¶3 This case is one of 23 actions filed by customers of Piper which allege mismanagement of their accounts in the corporation's Butte office. This action involves a Co-Owner Account Agreement signed in 1992 by Mrs. Merrett and Mrs. Emett, Mrs. Merrett's daughter, and a PAT Plus Account agreement later signed by Mrs, Merrett, which contained an arbitration provision identical to the provision which was the subject of this Court's holding in *Willems v. U.S. Bancorp Piper Jaffray, Inc.*, 2005 MT 37, 326 Mont. 103, 107 P.3d 465. That case held that the arbitration clause granted Piper broad discretion over an investor's holdings and created a fiduciary duty thereby,

obligating Piper to advise the investor of the provision. Because Piper did not do so, the arbitration clause was unenforceable. *Willems*, ¶ 28.

¶4 The District Court denied Piper's motion to compel arbitration on several grounds, the first being Piper's failure to produce properly authenticated evidence of the pre-dispute arbitration agreement executed by the Plaintiffs. Piper objected to this exclusion of the agreement, but the District Court also entered conclusions of law and an order premised on admission of the asserted arbitration agreement. On appeal, Piper challenges the District Court's order on all grounds, including its denial of the agreement's admission into evidence. Respondents do not contest Piper's evidentiary argument on appeal, instead answering its arguments on the substantive issues. We conclude it is appropriate to resolve this matter on the same grounds we did in *Willems*.

¶5 The same holding as in *Willems* is required by the factual record here. The uncontroverted evidence is that the Plaintiffs were not advised of the arbitration agreement or its meaning. Indeed, the District Court found that the broker engaged in a pattern of conduct, including "flattery" and "professed romantic interest," which constituted "attempts to distract [the Plaintiffs'] attention away from the details of the accounts." Therefore, in light of *Willems*, we affirm the District Court's conclusion that Piper owed a fiduciary duty to explain the arbitration provision to Plaintiffs, that it breached that duty, and that, consequently, the pre-dispute arbitration provisions offered by Piper are unenforceable.

¶6 Affirmed.

/s/ Jim Rice
Justice

We Concur:

/s/ Brian Morris

/s/ John Warner

/s/ W. William Leaphart

/s/ James C. Nelson
Justices

No. 04-585

IN THE SUPREME COURT OF THE STATE OF MONTANA

2005 MT 116N

VICKIE BERRYMAN,

Plaintiff and Respondent,

v.

U.S. BANCORP PIPER JAFFRAY, INC., PIPER JAFFRAY, INC., ROBERT ENGLISH, THOMAS J. O'NEILL, and JOHN DOES, I through X,

(Filed May 05, 2005)

Defendants and Appellants.

APPEAL FROM:
District Court of the Second Judicial District,
In and for the County of Silver Bow, Cause No. DV 02-78
The Honorable John W. Whelan, Judge presiding.

COUNSEL OF RECORD:

For Appellants:

Stanley T. Kaleczyc, Esq., Brand G. Boyer, Esq., Browning Kaleczyc Berry & Hoven, P.C., Helena, Montana; John S. Lutz, Esq., Fairfield and Woods, P.C., Denver, Colorado

For Respondent:

Tina L. Morin, Esq., Poore Roth & Robinson, P.C., Butte, Montana

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Submitted on Briefs: April 20, 2005
Decided: May 5, 2005

Filed:

Ed Smith
Clerk

Justice James C. Nelson delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent but shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by case title, Supreme Court cause number and result to the State Reporter Publishing Company and to West Group in the quarterly table of noncitable cases issued by this Court.

¶2 U.S. Bancorp Piper Jaffray, Inc., Piper Jaffray, Inc., and Robert English (collectively, Piper) appeal an order of the District Court for the Second Judicial District, Silver Bow County, denying their motion to compel arbitration of the claims filed by Plaintiff and Respondent herein Vickie Berryman (Berryman). We affirm.

¶3 This case is one of 23 different lawsuits filed by individual investors of Piper involving the alleged mismanagement of the investors' accounts in Piper's branch office in Butte. This particular action involves two agreements Berryman entered into with Piper. On July 13, 1999, Berryman met with Thomas J. O'Neill (O'Neill), who at the time was a securities broker in Piper's Butte office, to open a Self-Directed IRA with Piper. O'Neill never explained to Berryman any of the terms of the agreement she signed, nor did O'Neill inform Berryman that the

agreement contained an arbitration clause. On September 30, 1999, Berryman opened a second account with Piper by executing a Piper Automatic Transfer (PAT) Plus Account Agreement. Once again, O'Neill did not explain the arbitration clause in the agreement to Berryman.

¶4 These facts and the issues arising from them are substantially identical to those in *Willems v. U.S. Bancorp Piper Jaffray, Inc.*, 2005 MT 37, 326 Mont. 103, 107 P.3d 465. In that case, we held that a clause in a PAT Plus Account Agreement granting Piper broad discretion over an investor's holdings created a fiduciary duty. *Willems*, ¶ 22. That clause, in addition to an arbitration clause, was included in Berryman's September 30, 1999 PAT Plus Account Agreement with Piper. *Willems* further held that because of the fiduciary duty, Piper was obligated to advise the investor of the consequences of the arbitration clause prior to the formation of the contract, and that because Piper did not, the arbitration clause was unenforceable. *Willems*,¶ 25,¶ 28.

¶5 Accordingly, in light of *Willems*, we affirm the District Court's conclusion that Piper owed a fiduciary duty to explain the arbitration provision to Berryman, that it breached that duty and, therefore, that the pre-dispute arbitration provisions are unenforceable.

¶6 Affirmed.

/s/ James C. Nelson
Justice

We Concur:

/s/ Patricia Cotter

/s/ John Warner

/s/ W. William Leaphart

/s/ Jim Rice

Justices

No. 04-448

IN THE SUPREME COURT OF THE STATE OF MONTANA

2005 MT 161N

JAMES LEARY,

Plaintiff and Respondent,

v.

U.S. BANCORP PIPER JAFFRAY, INC., THOMAS J. O'NEILL, ROBERT ENGLISH, and JOHN DOES, I through X,

(Filed Jun. 28, 2005)

Defendants and Appellants.

APPEAL FROM:
District Court of the Second Judicial District,
In and for the County of Silver Bow, Cause No. DV 2002-91
The Honorable Kurt D. Krueger, Judge presiding.

COUNSEL OF RECORD:

For Appellants:

Stanley T. Kaleczyc, Brand G. Boyar, Browning, Kaleczyc, Berry, & Hoven, P.C., Helena, Montana; John S. Lutz, Fairfield and Woods, P.C., Denver, Colorado

For Respondent:

Tina L. Morin, Esq., Poore, Roth & Robinson, P.C., Butte, Montana

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Submitted on Briefs: April 26, 2005
Decided: June 28, 2005

Filed:

Ed Smith
Clerk

Justice Patricia O. Cotter delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court 1996 Internal Operating Rules, the following decision shall not be cited as precedent. It shall be filed as a public document with the Clerk of the Supreme Court and shall be reported by case title, Supreme Court cause number and result to the State Reporter Publishing Company and to West Group in the quarterly table of noneitable cases issued by this Court.

¶2 U.S. Bancorp Piper Jaffray, Inc., and Robert English (collectively, "Piper"); appeal an Order of the District Court for the Second Judicial District, Silver Bow County. Defendant Thomas J. O'Neill ("O'Neill") is a former Piper employee and is not a party to this appeal. The District Court denied Piper's motion to compel arbitration of claims filed against Piper by James Leary ("Leary"). We affirm.

¶3 This case is one of twenty-three different lawsuits filed by individual investors of Piper involving the alleged mismanagement of the investors' accounts in Piper's branch office in Butte. The facts behind this particular action are that Leary was an unsophisticated investor who relied on O'Neill, his investment advisor, to explain the significant features of his investment accounts. When Leary opened an investment account with his wife in 1998,

O'Neill presented Leary with a PAT Plus Account Agreement containing, among other provisions, a clause compelling arbitration and a clause granting Piper broad discretion to purchase and sell account assets without Leary's authorization. Leary signed the agreement as directed by O'Neill. Leary later opened a second IRA account which also contained an arbitration provision similar to the PAT Plus Account Agreement's provision. O'Neill did not explain any of the features of the account agreements to Leary, not did anyone at Piper explain to Leary that the agreements contained an arbitration provision. Leary was not informed that by signing the account forms, he was waiving his right to access the state's courts to settle any disputes with Piper.

¶4 These facts and the issues arising from them are substantially identical to those presented in *Willems v. U.S. Bancorp Piper Jaffray, Inc.*, 2005 MT 37. ¶ 22, 326 Mont. 103, ¶ 22, 107 P.3d 465, ¶ 22, in which we held that a clause in a PAT Plus Account Agreement granting Piper broad discretion over an investor's holdings creates a fiduciary duty. *Willems* further held that because of the fiduciary duty, Piper was obligated to advise the investor of the consequences of the arbitration clause prior to the formation of the contract, and that because Piper did not, the arbitration clause was unenforceable. *Willems*, ¶¶ 25, 28.

¶5 We have determined to decide this case pursuant to our Order dated February 11, 2003, amending Section 1.3 of our 1996 Internal Operating Rules and providing for memorandum opinions.

¶6 We conclude that, in light of *Willems*, this case is clearly controlled by settled Montana law. Therefore, we

affirm the District Court's conclusion that Piper owed a fiduciary duty to explain the arbitration provision to Leary, that it breached that duty, and therefore the pre-dispute arbitration provisions are unenforceable.

/s/ Patricia Cotter
Justice

We Concur:

/s/ W. William Leaphart

/s/ Brian Morris

/s/ James C. Nelson

/s/ Jim Rice
Justices

No. 04-454

IN THE SUPREME COURT OF THE STATE OF MONTANA

2005 MT 37

HARRY WILLEMS,

Plaintiff and Respondent,

v.

U.S. BANCORP PIPER JAFFRAY, INC., THOMAS J. O'NEILL, ROBERT ENGLISH, and JOHN DOES I through X

(Filed Feb. 22, 2005)

Defendants and Appellants.

APPEAL FROM:
District Court of the Second Judicial District,
In and For the County of Cause No. DV 2003-25
Honorable Kurt Krueger, Presiding Judge.

COUNSEL OF RECORD:

For Appellants:

Stanley T. Kaleczyc and Brand G. Boyar, Browning, Kaleczyc, Berry & Hoven, P.C., Helena, Montana

John S. Lutz, Fairfield and Woods, P.C., Denver, Colorado

Robert J. Phillips, Phillips & Bohyer, P.C., Missoula, Montana (O'Neill)

For Respondent:

William P. Joyce, Joyce & Johnston, PLLP, Butte, Montana

Submitted on Briefs: November 30, 2004
Decided: February 22, 2005

Filed:

Ed Smith
Clerk

Justice Jim Rice delivered the Opinion of the Court.

¶1 This case is one of 23 lawsuits filed by individual investors against U.S. Bancorp Piper Jaffray, Inc. (Piper), Robert English (English), and Tom O'Neill (O'Neill). The plaintiff investors made various common law tort claims arising from the alleged mismanagement of their accounts created and maintained by Piper's branch office in Butte, Montana. O'Neill, who was a securities broker in Piper's Butte office,[1] allegedly took the actions that gave rise to the lawsuits, and English was O'Neill's direct supervisor throughout this time. In response to the lawsuits, Piper filed motions to compel arbitration in each case, seeking to enforce "pre-dispute" arbitration clauses – that is, clauses in the account agreements which required any dispute be resolved by arbitration. Piper's motions to compel arbitration led to a series of hearings by a panel of three district court judges, who were sitting individually on the cases, but who sat *en banc* to hear evidence common to all 23 cases. In addition, individual hearings were held with respect to several of the individual plaintiffs. While Piper called common witnesses to testify, O'Neill, in a prior discovery deposition, invoked his Fifth Amendment right against self-incrimination and did not offer testimony regarding the accounts at issue.

[1] At the time the lawsuits were filed, O'Neill was no longer employed at Piper.

¶2 Harry Willems (Willems) is the plaintiff in this matter. On April 7, 2004, the Second Judicial District Court, Silver Bow County, denied Piper's motion to compel arbitration of Willems's claims, and Piper appeals therefrom. We affirm.

¶3 The following issues are raised on appeal in regard to the District Court's denial of Piper's motion to compel:

¶4 Did the District Court err in holding that the PAT Plus Agreements created a fiduciary duty between Piper and Willems that was breached by Piper?

¶5 Did the District Court violate the Federal Arbitration Act and Montana law by holding the arbitration agreement to a different contractual standard when it concluded the PAT Plus Agreements were contracts of adhesion?

¶6 Did the District Court err in applying the *Kloss* factors?

¶7 Did the District Court err in holding that Willems failed to effectively waive his constitutional rights?

¶8 Is the securities arbitration process, held before a self-regulatory organization overseen by the United States Securities and Exchange Commission, fair and reasonable as a matter of law?

¶9 The District Court's order offered an extensive analysis of all issues raised by the parties. The District Court determined that the PAT Plus Agreements were contracts of adhesion; that Piper's pre-arbitration dispute provisions were unconscionable and not within plaintiffs' reasonable expectations; that Piper failed to demonstrate that plaintiffs voluntarily, knowingly, and intelligently waived their constitutional rights to a jury trial and access to the court;

Piper failed to demonstrate that plaintiffs received or reviewed the arbitration provision; and that a fiduciary duty was created by Piper's PAT Plus Agreements and breached by the defendants. We conclude that the issue pertaining to the fiduciary duty is determinative on appeal and therefore will not address the other issues, except as necessary to resolve the dispositive issue.

FACTUAL AND PROCEDURAL BACKGROUND

¶10 In 1986. Willems retained O'Neill as his broker and financial advisor to help him open a Self-Directed Individual Retirement Account (1986 IRA). Later that year, Willems opened a joint Piper Automatic Transfer Account with his wife Marie Willems, which he later upgraded to a Co-Owner Piper Automatic Transfer Plus Account in 1995. On November 9, 1993, Willems opened a Co-Owner Piper Automatic Transfer Plus Account with his mother Bernice Willems. The 1993 and 1995 Piper Automatic Transfer Plus Account agreements hereinafter shall be collectively referred to as the "PAT Plus Agreements."

¶11 Willems claims that O'Neill, supervised by English, engaged in unlawful, unreasonable, and unethical conduct relating to the 1986 IRA, which did not contain a predispute arbitration clause. Willems contests Piper's invocation of the PAT Plus Agreements' arbitration clauses because: (1) his claims are not based upon transactions in these accounts; and (2) Willems was informed that the PAT Plus Agreements were entirely separate and distinct from his 1986 IRA, and therefore had no affect on his 1986 IRA. Conversely, Piper explains that by signing the PAT Plus Agreements, Willems agreed to arbitrate disputes

relating to *any* account he held with Piper, and notes the following language found in both PAT Plus Agreements:

> You agree to arbitrate **any disputes** between Piper Jaffray and you. You specifically agree and recognize that **all controversies** which may arise between Piper Jaffray, its agents, representatives or employees and you concerning any transaction, account of the construction, performance or breach of this or **any other agreement between us, whether entered into prior, on, or subsequent to the date hereof** shall be determined by arbitration to the full extent provided by law. [Emphasis added.]

Thus, it is the arbitration provisions, set forth in the PAT Plus Agreements and incorporating Willems's 1986 IRA, which are at issue herein.

¶12 On January 24, 2003, Willems filed a complaint in the Second Judicial District Court against Piper, English, and O'Neill alleging mismanagement of his 1986 IRA. On March 24, 2003, Piper filed a motion to compel arbitration based upon the provisions of the PAT Plus Agreements requiring arbitration of disputes in any of Willems's accounts. On July 9, August 12, and September 3, 2003, a panel of three district court judges sat *en banc* to hear evidence common to all 23 cases arising from the alleged misconduct of Piper's broker, O'Neill. On April 7, 2004, the District Court denied Piper's motion to compel arbitration and stay proceedings. Piper appeals therefrom.

STANDARD OF REVIEW

¶13 We review whether a district court's conclusions of law are correct in determining whether or not an issue is

subject to arbitration under an existing agreement. *Iwen v. U.S. West Direct*, 1999 MT 63, ¶ 17, 293 Mont. 512, ¶ 17, 977 P.2d 989, ¶ 17. When a district court is asked to compel arbitration of a dispute, the threshold inquiry is whether the parties agreed to arbitrate. *Solle v. Western States Ins. Agency*, 2000 MT 96, ¶ 22, 299 Mont. 237, ¶ 22, 999 P.2d 328, ¶ 22. Because arbitration is a matter of contract, the rules of contract apply, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit. *Solle*, ¶¶ 22-23.

¶14 A fiduciary relationship is created whenever a broker has discretion to buy, sell, or otherwise control a client's account. *Chor v. Piper, Jaffray & Hopwood, Inc.* (1993), 261 Mont. 143, 153, 862 P.2d 26, 32. In determining the scope or extent of the fiduciary obligation, our review becomes highly fact intensive. *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 35, 310 Mont. 123, ¶ 35, 54 P.3d 1, ¶ 35.

DISCUSSION

¶15 Did the District Court err in holding that the PAT Plus Agreements created a fiduciary duty between Piper and Willems that was breached by Piper?

¶16 In *Chor*, we held that § 30-10-301(1), MCA, creates an implied code of conduct for brokers, violations of which may constitute a breach of the duty that a broker owes to his customer. *Chor*, 261 Mont. at 152, 862 P.2d at 31-32. We further held that in the absence of discretionary authority by a broker to buy and sell in a customer's account, no fiduciary relationship is created between the broker and the customer. *Chor*, 261 Mont. at 153, 862 P.2d

at 32. In *Kloss*, we inversely restated that principle, holding that "a fiduciary relationship *is created* whenever a broker has discretion to buy and sell in the client's account." *Kloss*, ¶35. Thus, we begin our analysis by first determining whether the PAT Plus Agreements granted such discretion to Piper's brokers.

¶17 Piper argues that the PAT Plus Agreements did not grant it discretion to make trades on behalf of its clients and therefore did not create a fiduciary duty. Piper contends the District Court improperly interpreted the following underlined contract provisions:

> **Customer's Orders Binding Until Notice of Death**
>
> Upon your death or failure to comply with any part of this Agreement or *whenever Piper Jaffray deems it necessary for its protection, Piper Jaffray is authorized (but is not required) to*:
>
> – Cancel outstanding orders;
>
> – *Purchase, sell, assign, receive and deliver all or any part of the securities held or carried for you*; and
>
> – Close out short sales by purchase upon any exchange board or market or any public or private sale at Piper Jaffray's option.

(Underlining added.) In particular, Piper claims that the phrase, "whenever Piper Jaffray deems it necessary for its protection," concerns Piper's rights upon a client's death or when a client is otherwise incapacitated. Piper makes note that upon the death or incapacity of a client, it must have a limited discretion over the client's accounts in case the securities decline in value so that it may ensure it is in

compliance with certain federal requirements, but that this limited discretion is not sufficient to trigger discretion for purposes of creating a fiduciary duty. Thus, Piper urges this Court to not derive a "broad" or "unfettered" grant of discretion from the middle of a provision that merely concerns Piper's rights upon the death or incapacitation of a client.

¶18 Additionally, Piper notes that its Supervisory Procedures Manual provides that a client must execute additional documents if the client wishes to grant discretion to Piper. Piper claims that Willems did not execute the required documentation according to the procedures in the supervisory manual. Piper argues that the fact that Willems's claims include allegations that Piper made "unauthorized transactions" in his 1986 IRA, a nondiscretionary account, is additional evidence that Willems understood that Piper lacked discretion to independently authorize transactions.

¶19 Finally, Piper argues that *Kloss* does not control the outcome here for two reasons. First, Piper asserts that the brokerage account agreement in *Kloss* is distinguishable from the PAT Plus Agreements. Second, it argues that the *Kloss* holding that a broker has a fiduciary duty to disclose and explain the arbitration clause within the account agreement is "in contrast to most statements of law." Piper contends that if a broker had discretion in handling an account, the broker's duties would not extend beyond financial management. Furthermore, Piper claims that brokers should not have the duty to read and explain arbitration clauses to clients since clients come to brokers for financial advice, not legal advice, and the broker may be engaging in the unauthorized practice of law.

¶20 Piper's second *Kloss* argument is essentially an invitation to revisit and reverse our holding in *Kloss*. However, we see no error in the *Kloss* Court's analysis as to the fiduciary duty in this context, and therefore, we decline Piper's invitation to revisit that decision. We reject Piper's argument that such discretion does not create a fiduciary obligation to explain the arbitration provisions, or that such an obligation requires the broker to engage in the unauthorized practice of law. The obligation is one which accompanies the fiduciary relationship created when a broker accepts a customer's authorization to make transactions within the customer's account in the broker's own discretion.

¶21 Willems responds to Piper's first *Kloss* argument by arguing that the language highlighted in the PAT Plus Agreements is similar to the language in the *Kloss* agreement, which provided:

> You may sell any or all property held in any of my accounts and cancel any open orders for the purchase or sale of any property without notice, in the event of my death or whenever in your discretion you consider it necessary for your protection.

Kloss, ¶ 36. We determined that this language granted discretion to the broker to buy and sell securities on behalf of the broker's client. *Kloss*, ¶¶ 36-37. Thus, Willems asserts the District Court properly concluded that the similar language in the PAT Plus Agreements likewise granted such discretion, thereby creating a fiduciary duty on behalf of the broker to explain the consequences of arbitration to clients.

¶22 In spite of Piper's contention that it is required under federal law to have "limited discretion" to make transactions on behalf of its clients to ensure compliance with certain federal requirements, the PAT Plus Agreements contain no provisions or explanations as to this "limitation" or that the discretion granted in the agreement is effective only when securities decline in value. Moreover, the plain meaning of the following language – "upon your death **or** failure to comply with any part of this Agreement **or** whenever Piper Jaffray deems it necessary for its protection" – demonstrates that Piper retained broad authority to purchase, sell, assign, receive and deliver all or any part of the securities held by its clients. (Emphasis added.) Indeed, transactions could be made whenever Piper "deem[ed] it necessary" for its own best interest. Thus, the District Court did not err in concluding that the PAT Plus Agreements granted Piper's brokers discretion to buy and sell securities thereby creating a fiduciary duty.

¶23 Piper contends that the District Court erroneously concluded that a fiduciary duty existed before Willems signed the PAT Plus Agreements. Piper explains that written contracts are only effective at delivery, and therefore a fiduciary duty, triggering an obligation to explain the arbitration provision, could not exist before the PAT Plus Agreements were signed. Willems responds that Piper's argument is misplaced in view of our holding in *Kloss*. Willems argues that when a fiduciary duty is created, even if it is created the very moment *after* the agreement is signed, a broker has a duty to advise its customers – pursuant to its duty of the finest loyalty – as to the nature of arbitration, or if the client may "opt out" of arbitration by crossing out the provision.

¶24 In *Kloss*, an investor opened an account which contained a pre-dispute arbitration clause. We concluded that, because the brokerage firm had discretion to buy and sell securities in the investor's account, a fiduciary relationship was created and the broker had an obligation to explain the effect of an arbitration clause. *Kloss*, ¶ 37. Although we did not state that the obligation arose prior to the actual signing of the agreement, that was, by necessity, the effect of our holding. Entering an agreement which bestows discretion upon the broker requires that the customer be advised of the agreement's arbitration provision so that an informed decision to sign the agreement can be made.

¶25 It is undisputed that Piper did not advise Willems as to the nature of the arbitration clause or that he had the option of crossing out certain provisions. Further, the District Court found, and Piper does not challenge on appeal, that Willems did not understand that by signing the PAT Plus Agreements he was in any way affecting his 1986 IRA. Therefore, in accordance with our holding in *Kloss*, we conclude the District Court did not err in holding that the PAT Plus Agreements created a fiduciary duty between Piper and Willems and that Piper breached its fiduciary duty when it failed to explain the consequences of the arbitration provision prior to the formation of the contract.

¶26 Finally, Piper contends that, pursuant to the *Kloss* Court's determination that the analysis as to whether a fiduciary duty exists is "highly fact intensive," the facts here are distinguishable from those in *Kloss*. It notes that, in *Kloss*, the broker had a regular practice of explaining key contract terms to the customer, and that this led the Court to conclude that the broker had a fiduciary duty to

explain the arbitration provision to the customer. Piper thus reasons that the District Court improperly relied on *Kloss* to create a "special legal standard" regarding fiduciary duties applicable only to arbitration provisions and not to other contract provisions, in violation of the Federal Arbitration Act (FAA) and United States Supreme Court precedent.

¶27 We conclude that the District Court created no new special legal standards but instead properly applied Montana case law by relying on *Kloss*. "The FAA provides that an agreement to arbitrate is valid except where grounds exist at law or in equity to revoke the contract. . . . Montana law also requires the enforcement of predispute arbitration clauses 'except upon grounds that exist at law or in equity for the revocation of a contract.' *Kingston v. Ameritrade, Inc.*, 2000 MT 269, ¶ 13, 302 Mont. 90, ¶ 13, 12 P.3d 929, ¶ 13 (citing § 27-5-114(2), MCA). Though the brokerage firm in *Kloss* had a "regular practice of explaining key contract terms," the enforceability of an arbitration provision is not dependent upon such an office custom or practice. The determination of the existence of a duty here is dependent upon all of the facts, and particularly, the extent of authority or discretion granted by the customer within the agreement.

¶28 We affirm the District Court's conclusion that Piper owed a fiduciary duty to explain the arbitration provision to Willems which was breached, and further, that the predispute arbitration provisions in the PAT Plus Agreements are unenforceable.

/s/ Jim Rice
Justice

We Concur:

/s/ James C. Nelson

/s/ Patricia Cotter

/s/ John Warner

/s/ W. William Leaphart

Justices

KURT KRUEGER
DISTRICT COURT JUDGE, DEPT. I
SILVER BOW COUNTY COURTHOUSE
155 W. GRANITE ST.
BUTTE, MT 59701
406/497-6410

MONTANA SECOND JUDICIAL DISTRICT COURT,
SILVER BOW COUNTY

HARRY WILLEMS, **Plaintiff,** **vs.** **U.S. BANCORP PIPER JAFFRAY, INC., THOMAS J. O'NEILL, ROBERT ENGLISH & JOHN DOES I through X,** **Defendants.**	* * * * * * * * * * * *	**CAUSE NO. DV-03-25** **FINDINGS OF FACT, CONCLUSIONS OF LAW & ORDER** (Filed Apr. 7, 2004)

INTRODUCTION

Almost two dozen individuals who were investors with Piper Jaffray (Piper) at its Branch Office in Butte, Montana, have filed suits in the above-referenced cases against Piper as a result of its business practices and those of its account executive, Tom O'Neill. The lawsuits involve the investors' individual investment accounts which were created and maintained at the Butte office. While, of course, the circumstances surrounding the opening and maintenance of these accounts vary somewhat among those Plaintiffs, there is a similar, if not identical, fact pattern with respect to the essential facts surrounding the actual creation and maintenance of those accounts. Plaintiffs allege a number of common law tort claims which

arise from a variety of illegal business practices, such as "churning," unauthorized trading, and inappropriate trading. Plaintiffs allege that Piper failed to properly supervise O'Neill, who was at the time of his misconduct was subject to a Consent Decree with the Montana State Auditor. The decree arose out of prior misconduct of O'Neill which had been uncovered following an administrative investigation in the early 1990s. Piper had a duty to supervise O'Neill to insure that his misconduct and unethical practices as a broker would not be repeated. Plaintiffs allege that Piper not only allowed, but encouraged, O'Neill to repeat the proscribed business practices which had given rise to the Consent Decree.

Defendants have filed Motions to Compel Arbitration in all of the above-referenced cases. The motions gave rise to a series of hearings by the three Montana District Court Judges to whom these Piper cases have been assigned, Hon. Kurt Krueger, Hon. John W. Whelan, and Hon. Thomas M. McKittrick. Individual hearings took place with respect to many of the Plaintiffs who have a pending claim against Piper. Additionally, the three judges, sitting in an *en banc* configuration, heard the testimony, and received evidence, from "common expert witnesses" and "common fact witnesses." Those "common witness" hearings took place on August 12, 2003, and September 3, 2003, at which Plaintiffs called Professor William Corbett as a common expert witness. Plaintiffs called Jerry Campbell, a former Piper account executive, as a common fact witness. Defendants called Michael Perino, of New York, and Wendy Harmsen, of Minneapolis, as common expert and fact witnesses, respectively.

In a prior discovery deposition, Defendant Tom O'Neill refused to respond to questioning regarding the opening

and formation of Plaintiffs' accounts, citing his Fifth Amendment right against self-incrimination. Thus, there was no testimony presented by Defendants to refute the testimony of any Plaintiff with regard to the opening and maintenance of the account documents which they had signed which contained the pre-dispute arbitration clauses which are the basis of Defendants' motion to compel arbitration.

Following the conclusion of these common hearings, the parties submitted their post-hearing briefs on October 10, 2003.

FINDINGS OF FACT

Findings of Fact Specific for this Plaintiff

1. The Plaintiff Harry Willems is an unsophisticated retired Anaconda Company employee with less than an eighth grade education. (TR, Willems, 7/9/03, pg. 21).

2. Because of his lack of sophistication and education, Mr. Willems was not capable of understanding the language used in Piper's account agreements including the language in the arbitration provision. *Id.*

3. Mr. Willems' dealings with O'Neill date back to the 1980's when O'Neill was with DA Davidson. O'Neill took the account from DA Davidson to Piper when he moved to Piper. *Id.* at 23.

4. Based upon Mr. Willems' testimony and demeanor in court it is apparent that Mr. Willems is a person of limited intelligence. This fact would have been apparent to O'Neill after his first meeting with Mr. Willems. O'Neill was aware that Mr. Willems was unsophisticated and had only an 8th grade education. *Id.* at 24.

5. Because of his lack of intelligence and extreme lack of sophistication, Mr. Willems relied on O'Neill to explain beforehand the purpose of the documents he asked Mr. Willems to sign and O'Neill did speak with Mr. Willems about the purpose of the documents he needed Mr. Willems to sign before Mr. Willems was asked to sign the documents. *Id.* at 32.

6. The current litigation involves mismanagement of Mr. Willems' IRA account. *Id.* at 27. Mr. Willems opened the IRA account in March of 1986. The account agreement concerning the IRA does not require that Mr. Willems submit to binding arbitration concerning his IRA. See Plaintiff's Exhibit 1.

7. Mr. Willems had two other accounts with Piper Jaffray. One, a joint PAT Plus account agreement with his mother Bernice Willems (Exhibit A) and another a joint PAT Plus account agreement with his wife Marie (Exhibit B).

8. Both of the PAT Plus account agreements begin with the following language:

> This agreement ("Agreement") sets forth the terms and conditions governing the Piper Jaffray PAT Plus Account ("PAT Plus Account") offered by Piper Jaffray Inc. ("Piper Jaffray"), for which you (all such signatories hereto, whether acting in their individual or representative capacities, are sometimes referred to as "you") are making application with Piper Jaffray.

This language is inconsistent with the following language in the Pre-dispute Arbitration provision which suggests that the account agreement applies to other accounts:

> You agree to arbitrate any disputes between Piper Jaffray and you. You specifically agree

and recognize that all controversies which may arise between Piper Jaffray, its agents, representatives, or employees and you concerning any transaction, account or the construction, performance or breach of this or any other agreement between us, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration to the full extent provided by law.

9. The PAT Plus account agreements also contain the following language which confers discretion on Piper:

> b. "Upon your death or failure to comply with any part of this Agreement *or whenever Piper Jaffray deems it necessary for its protection, Piper Jaffray is authorized (but is not required) to:*
>
> - Cancel outstanding orders;
> - *Purchase, sell, assign, receive and deliver all or any part of the securities held or carried for you;* and
> - Close out short sales by purchase upon any exchange board or market or any public or private sale at Piper Jaffray's option. (Emphasis added) (See Exhibit A)

10. Neither O'Neill nor anyone else at Piper ever advised Mr. Willems about the consequences of the pre-dispute arbitration provisions. Mr. Willems did not understand that the arbitration provisions existed until he spoke with his lawyer during this litigation. *Id.* at 32.

11. When Mr. Willems signed the two PAT Plus agreements he did not know that these accounts contained arbitration. Further, Mr. Willems understood that the joint account with his mother and the joint account

with his wife were separate and distinct accounts and he did not believe that by signing documents relating to these two accounts that he was in any way affecting his IRA account. *Id.* at 28.

12. Mr. Willems signed the joint PAT Plus account with his mother Bernice (Exhibit A) at the urging of O'Neill who told Mr. Willems that this was necessary to look after Mr. Willems' mother. *Id* at 29. This was done because Mr. Willems' mother had become very sick and could not take care of her business anymore and O'Neill told Mr. Willems that he should put his name on the account to make sure that his mother's money could be looked after. *Id.* at 11. Mr. Willems was concerned that if his name was not put on the account that his mother would be conned out of her money. *Id.* at 28.

13. When Mr. Willems had his name placed on his mother's account he did not expect that this was in any way affecting his rights vis-a-vis his IRA in that he understood that those accounts were separate and distinct accounts. *Id.* at 29.

14. When counsel for Piper read portions of the arbitration provisions contained in the PAT Plus account agreements, it was apparent to the Court that Mr. Willems did not understand the language used and Mr. Willems clearly indicated that he did not understand the arbitration provision. In his words, it was all "Greek to me". *Id.* at 15.

15. O'Neill took steps to gain Mr. Willems' trust. He repeatedly advised Mr. Willems that he was looking after his accounts just like he looked after his dad's accounts. O'Neill even made reference to a small notebook on his desk which supposedly contained the names of O'Neill's dad and Mr. and Mrs. Willems. O'Neill would make reference to this notebook and

advised Mr. Willems that he checked the stocks of the peoples whose name were in the notebook everyday and that Mr. Willems did not need to worry. *Id.* at 23. O'Neill further told Mr. Willems that he would check his stock every day just like he checked the stocks of his dad. Based upon these representations Mr. Willems came to trust O'Neill. *Id.* at 24.

16. Mr. Willems and his wife Marie made it clear to O'Neill that they wanted the joint account invested conservatively in a money market account and not in the stock market. O'Neill assured Mr. Willems that the joint account with his wife would be kept entirely separate from his IRA. O'Neill never told Mr. Willems or his wife when they opened up the joint money market account that it would in any way effect his IRA. Mr. Willems understood that the money market account was completely separate from the IRA and this was the only reason Mr. Willems and his wife opened the joint PAT Plus account. *Id.* at 30.

17. Mr. Willems understood that the IRA account had specific rules that did not allow him to make withdrawals whenever he wanted. The joint account, in contrast, could be accessed by he and his wife at any time. These differences in rules regarding access to the accounts provide further support for Mr. Willems' reasonable belief that in signing the PAT Plus account agreement he was not affecting his rights vis-a-vis his IRA.

18. O'Neill did not testify at the hearing although he had the ability and opportunity to do so.

Findings Concerning Contract of Adhesion

19. The contracts at issue in the instant case are standardized form contracts, prepared by Piper Jaffray.

20. Piper Jaffray, because they controlled the Plaintiffs access to the securities market, had superior bargaining power in the transactions at issue herein relative to the Plaintiff who was an unsophisticated investor.

21. The provisions of these form contracts, and in particular the arbitration provisions, are drafted in accordance with industry practice and standards to conform to rules promulgated by the self-regulating organizations (SROs) that govern the entire securities industry. *See* Tr. Perino, 9/3/03, at pg. 44.

22. These contracts and the arbitration provisions they contain are, on their face, contracts of adhesion, in that the form language provides no "opt-out" provision with regard to the arbitration clause, or any other contract provisions. Tr. Corbett, 8/12/03, at pgs. 60-61. The customer is provided no opportunity on the face of the document to select or consent to certain provisions, and not to others. A signature on the document purports to bind the consumer investors to all of the contract terms.

23. Piper did not call any employee from the Butte office to testify that they implemented or were even aware of the alleged "opt out" policy. O'Neill did not testify in this regard. English did not testify in this regard. The only witness who testified about the procedures in the Butte office was Jerry Campbell who was called by the Plaintiffs. Campbell testified that he was unaware of the alleged policy and that based upon his training and experience with Piper, the account documents were to be presented to investors on a take-it-or-leave-it basis. Given that Piper, O'Neill and English all had the ability to testify and establish that the "opt out" policy was a part of the Butte operation and failed to do so and given the testimony of Jerry Campbell the court finds that there was no "opt out" policy in effect in the Butte office and that the account documents

were presented to Butte investors (like the Plaintiff) on a take-it-or-leave-it basis.

24. These account forms, prepared by Piper Jaffray, were presented to the Plaintiffs on a "take it or leave it" basis, in accordance with the manner in which brokers are trained by Piper Jaffray to present these forms to their clients and prospective clients. *See* Tr. Campbell, 9/3/03, pg. 11.

25. Moreover, the new PAT Plus forms presented to many of the plaintiffs for their signatures in 1993 were enclosed with a cover letter, advising that if the customers did not accept the terms of the new account forms, they would be transferred to a fee-paying account. Tr. Harmsen, 9/3/03, at pgs. 213-215. Thus, not only were the contracts presented on a "take it or leave it" basis, but additionally, on a "take it or pay a fee" basis.

26. The letter, while purporting to advise customers of the essential new account terms, failed to inform the Butte branch customers that the new PAT Plus forms contained a pre-dispute arbitration clause, which for many customers, would be included within their account agreements for the first time. *Id.*

27. Plaintiffs herein had no bargaining power or meaningful opportunity to negotiate the terms of their contracts, including the arbitration provision.

28. Piper Jaffray's alleged "opt out" policy relating to the arbitration clause alone, but no other provisions in the form contracts, does not provide investors with a meaningful choice in opting out of the arbitration provision.

29. According to this alleged policy, branch managers are given discretion to permit a customer, at the customer's request, to cross out the arbitration clause in

the account agreement forms. TR. Harmsen, 172, Hearing Exhibit 4.

30. Piper does not apprise potential investors of the existence of the alleged "opt out" policy. Piper's investment executives who open new accounts in accordance with Piper Jaffrays policies, procedures and training do not inform or apprise their customers either of the existence of the arbitration clause, or of the alleged "opt out" policy. Tr. Harmsen, 9/3/03, pg. 216. *See* also Tr. Campbell, 9/3/03, pgs. 11 and 12.

31. To be able to take advantage of this alleged "opt out" option, the Plaintiffs in this litigation would have had to have initiated the discussion with O'Neill, and questioned whether it would be possible to cross out the arbitration provision. Even then, the determination of whether this would be permissible would be made by the Branch Manager.

32. The alleged "opt out" policy was not known to the Butte branch office, from which the Plaintiffs' account originated. The Branch Manager (Bob English) and Mr. Campbell both had never heard of such a policy, and the so-called "policy" itself is centrally maintained in Minneapolis, and not distributed to the branches. Tr. Harmsen, pgs. 175-77. Tr. Campbell at pgs. 8-12 and pg. 20. Tr. English, (in Emett/Merrett hearing), 8/8/2003 pgs. 91-98.

33. It would have been impossible for the Butte office to have implemented the supposed opt-out policy with regard to the Plaintiffs in this litigation without having any knowledge of its existence, particularly in light of the fact that the option lies completely within the discretion of the Butte branch managers, but the Butte branch manager had no knowledge whatsoever that he had such discretion.

34. Plaintiffs did not have reasonable notice of their supposed opportunity to negotiate or reject the arbitration clause. The contracts, on their face, provide no indication that the arbitration provision is optional, and can be crossed out. Piper Jaffray did not inform Plaintiffs that the arbitration provision was negotiable.

35. The Plaintiff in the instant litigation had no actual, meaningful or reasonable choice to negotiate or exercise any discretion with regard to the arbitration provision contained in the standardized Piper Jaffray form contracts.

36. Investors such as Plaintiffs face the possibility of being excluded from the securities market unless they accept Piper Jaffray's contract with such an agreement to arbitrate.

Findings Concerning Unconscionability

37. It is undisputed that under NASD and NYSE rules one of the three arbitrators must be affiliated with the securities industry. There is no requirement that an arbitrator must be affiliated with the industry in which the small investor, or "one time player," is employed. The securities industry will always have one third of the panel represented by it. There is clearly a disparity of representation which is inherently suspect. The securities industry itself has recognized that this disproportionate representation creates an appearance of pro-industry bias.

38. Repeat players are favored in securities arbitrations as opposed to workers or consumers who are unlikely to be involved in arbitration more than one time. According to Professor William Corbett of the University of Montana Law School, who is a very experienced labor arbitrator in the Pacific Northwest, whose testimony

the Court finds credible, empirical studies conducted by legal commentators have concluded that arbitrators tend to favor repeat players.

39. Filing fees for securities arbitration under NASD rules are substantial and far greater than the filing fees imposed in the Montana district courts. It is undisputed that the filing fees for such claims are in the range of $1,400 and $1,500, for a filing fee and a hearing deposit. This conclusion was not disputed by Piper's retained expert, Michael Perino. Fees at the rate of $450 per day for each additional day of a hearing would be charged.

40. Securities arbitration under the required NASD or NYSE rules impose significant arbitrator fees which make small claims prohibitive and discriminate against investors of modest means. In addition to the formal filing fees, an investor located in Montana would be required to either seek a waiver of the requirement that the arbitration be held in a state which has a NASD District Offices, and then pay the lodging and travel expenses of the arbitrators who are required to travel from their states of residence to Montana, or pay the expenses of Montana witnesses who would be required to travel outside of Montana to testify.

41. Additionally, arbitrator fees are $400 per session day, plus $75 additional for the chair person of the three-member panel, or $1,275 per day. Thus, if a case were to last five days, arbitrator fees alone would amount to $6,375, not to mention travel and related lodging expenses. In contrast, in the Montana district courts, no litigant is required to pay for the daily fees or expenses of either judges or juries.

42. The NASD and NYSE rules require private arbitration proceedings, which result in summary decisions

which provide no basis or opportunity for an explanation of the findings of the arbitrators, or the applicable law upon which the decision is based. These rules specifically preclude written decisions explaining their findings of fact and conclusions of law. Professor Corbett concluded that the failure to provide a written explanatory decision is not only intentional, but touted as an "advantage" of arbitration because the decision makers are not "burdened" with the obligation to explain their decisions. There are no recognized public law reporting publications of securities decisions. This "penchant for secrecy" is an accepted feature of securities arbitration, and therefore frustrates a litigant's effort to seek a vacatur of the award in the courts, and may conceal an intentional disregard of the law. Additionally, as Professor Corbett points out, the failure to explain decision making may obscure biased or erroneous decision making. Securities arbitration proceedings thus become shrouded in secrecy because they are conducted in private forums which excludes public decision making. As a result, wrongdoing or other oppressive conduct by the securities industry or its members precludes any meaningful expose of such conduct and activities.

43. Securities arbitration is expressly designed to excuse arbitrators from being bound by the facts or law. It is expressly designed to preclude arbitrators from disclosing to the parties written reasons which would explain the basis of their decision. The pre-dispute arbitration provision at issue in this case recites that:

> The arbitrators' award is not required to include factual findings or legal reasoning and any party's right of appeal to seek modification of rulings is strictly limited.

44. Many legal commentators have rightfully criticized the securities industry for insisting that its arbitration processes be expressly designed to preclude explanatory decisions which can serve as the basis of judicial review.

45. The pre-dispute arbitration provision, which is the subject of the motion to compel, severely limits the opportunity of claimants to discover facts necessary to prove a claim such as a company's business practices. This fact is stated clearly in Piper's own arbitration provision, to wit:

> Pre-arbitration discovery is generally more limited than and different from court proceedings.

Additionally, securities industry arbitration rules discourage discovery except to a very limited extent. Depositions are "strongly discouraged", and limited to "exceptional circumstances". There has also been criticism of the limited role of discovery in arbitration cases, because securities firms can effectively "stonewall" discovery requests and delay production of information until the time of the hearing.

46. Because of the limited role of discovery in securities arbitration, the ability of a litigant to discovery matters not specifically related to the investor's account is severely compromised, making it difficult, if not impossible, to establish a company's business practice. In the instant case, allegations of improper business practices are central to Plaintiffs' tort claims and other claims surrounding the manner in which the Defendant Piper Jaffray and O'Neill conducted their business and the manner in which Piper supervised and encouraged O'Neill to maintain business practices previously determined to be improper. See Plaintiff's Complaint.

CONCLUSIONS OF LAW

Piper's Burden of Proof

1. The procedure for analyzing a Motion to Compel Arbitration is set forth in §27-5-115 MCA which provides in relevant part:

> Proceedings to compel or stay arbitration. (1) On the application of a party showing an agreement described in 27-5-114 and the opposing party's refusal to arbitrate, the district court shall order the parties to proceed with arbitration; but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of that issue raised and shall order arbitration if it finds for the applying party or deny the application if it finds for the opposing party; (2) On application, the district court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be immediately and summarily tried and the stay ordered if the court finds for the applying party. If the court finds for the opposing party, it shall order the parties to proceed to arbitration.

In this case, there exists a substantial and bona fide dispute concerning the enforceability of the alleged arbitration provisions. Pursuant to *Kingston v. Ameritrade, Inc.*, 2000 MT 269, 302 Mont. 90, 12 P.3d 929 this Court must therefore, conduct a hearing to obtain evidence to resolve the dispute. Such hearings have been held. Piper has the initial burden of establishing a valid agreement to arbitrate.

Fiduciary Duty Created by Piper's PAT Plus Agreement and O'Neill's Representations

2. In *Kloss v. Edward D. Jones* the Montana Supreme Court held that a fiduciary relationship is created whenever a broker has discretion to buy and sell securities in a client's account. The discretion to buy and sell can arise from the language in the account agreement. In *Kloss* the court found that the following language created a fiduciary duty on behalf of the broker and brokerage house:

> You may sell any and all property held in any of my accounts and cancel any open orders for the purchase or sale of any property without notice, in the event of my death or whenever in your discretion you consider it necessary for your protection. *Id.* at paragraph 36.

3. The *Kloss* court also held that if a pre-dispute arbitration provision is contained in an agreement that creates a fiduciary relationship then the broker and brokerage house has a duty to explain the consequences of the pre-dispute arbitration provision they seek to enforce. *Id.* at paragraph 38.

4. The language contained in Piper's PAT Plus Agreements set forth in Finding of Fact number 9 creates a fiduciary duty on behalf of Piper and O'Neill to explain the consequences of the arbitration provisions Piper seeks to enforce.

5. The scope of or extent of a fiduciary obligation depends on the facts of the case. *Kloss,* supra at ¶ 31, In *Deist v. Wacholz,* 208 Mont. 207, 678 P.2d 188 (1984) the Montana Supreme Court found that a fiduciary duty arose when a bank officer undertook to provide financial advise [sic] to an elderly customer concerning the sale of her ranch. Because of Mr. Willems extreme unsophistication and lack of education which

O'Neill was aware of and because of the representation that O'Neill made about looking after his accounts like he did his father's account, O'Neill established a fiduciary relationship with Mr. Willems which also gives rise to the duty to explain arbitration.

6. Because neither Piper nor O'Neill explained the consequences of the arbitration provision in the PAT Plus Agreements and because of the existence of the fiduciary duty, Piper cannot now enforce those arbitration provisions are unenforceable.

Piper's Account Agreements are Contracts of Adhesion

7. A contract of adhesion is a contract whose terms are dictated by one contracting party to another who has no voice in its formation. *Kloss* at paragraph 24, citing Corbin on Contracts, section 1.4 at 13 (1993).

8. "Contracts of adhesion arise when a standardized form of agreement, usually drafted by the party having superior bargaining power, is presented to a party, whose choice is either to accept or reject the contract without the opportunity to negotiate its terms." *Kloss*, 2002 MT 129 ¶ 24 (quoting *Passage v. Prudential Bache Securities, Inc.* (1986), 223 Mont. 60, 66, 727 P.2d 1298, 1301-02 (citations omitted)).

9. In *Passage v. Prudential-Bache Securities, Inc.* (1986), 223 Mont. 60, 727 P.2d 1298, the Montana Supreme Court described contracts of adhesion in the Securities context and the circumstances under which they are unenforceable as follows:

> . . . [T]he investor is faced with an industry wide practice of including Arbitration Clauses in standardized brokerage contracts. As the investor faces the possibility of being

> excluded from the securities market unless he accepts a contract with such an agreement to arbitrate, such clauses come within the adhesion doctrine. However, mere inequality in bargaining power does not render a contract unenforceable, nor are all standardized contracts unenforceable. As a consequence of current commercial realities, form forum clauses will control, absent a strong showing it should be set aside. For such a contract or clause to be void, it must fall within judicially imposed limits of enforcement. It will not be enforced against the weaker party when it is: (1) not within the reasonable expectations of said party or (2) within the reasonable expectations of the party, but, when considered in its context, is unduly oppressive, unconscionable, or against public policy. [Citations omitted.]

10. In contracts of adhesion, the contract terms are "dictated by one party to another who has no bargaining power and no realistic options." *Kloss,* 2002 MT 129 ¶24. If the party in the lesser bargaining position has no meaningful opportunity to negotiate or reject the terms of a contract, the contract is one of adhesion. *See Circuit City v. Mantor,* 335 F.3d 1101 (9th Cir. 2003) (applying California law).

11. "A meaningful opportunity to negotiate or reject the terms of a contract must mean something more than an empty choice. *At a minimum, a party must have reasonable notice of his opportunity to negotiate or reject the terms of a contract, and* he must have an actual, meaningful, and reasonable choice to exercise that discretion." *Circuit City v. Mantor,* 335 F.3d 1101, 1106 (9th Cir. 2003) (applying California law). (emphasis added).

12. Based upon the above Findings of Fact, Piper's account agreements are determined to be contracts of adhesion.

Piper's Pre-Dispute Arbitration Provision is Unconscionable

13. In *Kloss* the Court set forth the following eight factors which this Court must examine in determining the issue of the conscionability of Piper's pre-dispute arbitration provision:

    1. Are potential arbitrators disproportionately employed in one or the other party's field of business?

    2. Do arbitrators tend to favor "repeat players" as opposed to workers or are unlikely to be involved in arbitration again? In other words, is there a tendency by arbitrators to avoid decisions which will result in the loss of future contracts for their services?

    3. What are the filing fees for arbitration compared to the filing fees in Montana's district courts?

    4. What are arbitrators' fees? Do they make small claims prohibitive? Do they discriminate against consumers or workers of modest means?

    5. Are arbitration proceedings shrouded in secrecy so as to conceal illegal, oppressive or wrongful business practices?

    6. To what extent are arbitrators bound by the law?

7. To what extent are arbitrators bound by the facts?

8. What opportunity do claimants have to discover the facts necessary to prove a claim such as a company's business practices?

14. Based upon the above Findings of Fact, the Court finds that Piper's pre-dispute arbitration provision is unconscionable and therefore unenforceable.

Piper's Pre-Dispute Arbitration Provision Was Not Within The Plaintiff's Reasonable Expectations

15. Based upon the above Findings of Fact the Court concludes that Mr. Willems' reasonable expectation when signing Exhibit A was to protect his mother by placing his name on her account. Mr. Willems' reasonable expectations did not include agreeing to binding arbitration of disputes concerning his IRA account which is the subject of this litigation.

16. Based upon the above Findings of Fact, the Court concludes that Mr. Willems' reasonable expectation in signing Exhibit B was to establish a conservative money market account with his wife. These expectations had nothing to do with his IRA. Therefore, Mr. Willems did not reasonably expect that by signing Exhibit B he was agreeing to binding arbitration of disputes concerning his IRA which is the subject of this litigation.

Piper Has Failed to Demonstrate that the Plaintiff Voluntarily, Knowingly, and Intelligently Waived His Constitutional Rights to a Jury Trial and Access the Courts

17. The right of trial by jury is secured to all and shall remain inviolate. Article II, Section 26, Montana Constitution. This constitutionally guaranteed right is fundamental and deserving of the highest level of court scrutiny and protection. *State v. LaMere*, 2000 MT 45, 298 Mont. 358, 2 P.3d 204.

18. Courts of justice shall be open to every person and speedy remedy afforded for every injury to person, property, or character. Article II, Section 16 Montana Constitution. This right is as fundamental as any other Article II right because the right of access to the courts is included within the Constitution's Declaration of Right and without the right to access the courts other Article II rights would have little protection from infringement, and, thus, little meaning. *Kloss*, supra (Nelson, J. concurring) at ¶ 57.

19. Constitutional rights that cannot be enforced are illusory. *Id.* at ¶ 58.

20. A waiver of a fundamental right must be proven to have been made voluntarily, knowingly and intelligently – typically by the party seeking the waiver. *Id.* at ¶ 64.

ORDER

Based upon the Findings of Fact herein, the Court finds that Piper has failed to demonstrate a voluntary, knowing, and intelligent waive by the Plaintiff of his constitutional rights.

Accordingly, it is hereby

ORDERED that the Defendant's Motion to Compel Arbitration and Stay Proceedings is DENIED.

DATED this 7th day of April, 2004.

/s/ Kurt Krueger
KURT KRUEGER
District Court Judge

MONTANA SECOND JUDICIAL DISTRICT COURT
SILVER BOW COUNTY

JAMES LEARY, Plaintiff, vs. U.S. BANCORP PIPER JAFFRAY, INC., PIPER JAFFRAY, INC., ROBERT ENGLISH, THOMAS J. O'NEILL AND JOHN DOES I AND X, Defendants.	)	CAUSE NO. DV-02-91

TRANSCRIPT OF PROCEEDINGS

Taken at:
COURTROOM
BUTTE-SILVER BOW COUNTY
COURTHOUSE
155 WEST GRANITE STREET
BUTTE, MONTANA 59701
FEBRUARY 26, 2003

HONORABLE KURT KRUEGER, PRESIDING

* * *

[11] A. No.

Q. Had you had an account somewhere else?

A. No.

Q. And did there come a time when you decided to open an account with Mr. O'Neill?

A. Myself?

Q. Yes.

A. Yes, in – I believe it was in June the 30th of 2000, I was going to move my 401(k) from Montana Resources and put it into an IRA. And since we were already involved with Piper Jaffray, with Tom O'Neill, we went with Mr. O'Neill.

Q. And when did you first get involved with Piper Jaffray?

A. I believe it was in October of 1998 when my wife opened her account.

Q. She had a separate account?

A. Yes, she did.

THE COURT: That wasn't a joint account.

THE WITNESS: Well, my name was on it.

THE COURT: As a beneficiary?

THE WITNESS: Yeah, I believe I was.

THE COURT: As a beneficiary but not as an account holder?

THE WITNESS: No. It was her account.

[12] Q. (By Mr. Lutz) So you had no prior account relationship with Mr. O'Neill other than being a beneficiary on your wife's account; is that right?

A. Yeah, as far as I understand.

Q. So then you opened the 401(k) in 2000?

A. Yes, I did.

Q. And was that your retirement monies from – that you kept elsewhere?

A. Yes.

Q. Was that with your prior employer?

A. Yes.

Q. And when you opened the account, did you meet with Mr. O'Neill at the time?

A. Yes.

Q. The 401(k) account?

A. Yeah.

Q. And you never had your own brokerage account before that time?

A. No.

Q. Did Mr. O'Neill review the account document with you when you opened the account?

A. No, he didn't.

Q. Did you take an opportunity to review the document yourself?

A. No.

* * *

PIPER JAFFRAY

Customer Copy

* * *

12. Customer Agrees to Arbitrate.

- **Arbitration is final and binding on the parties.**
- **The parties are waiving their right to seek remedies in court including the right to jury trial.**
- **Pre-arbitration discovery is generally more limited than and different from court proceedings.**
- **The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or seek modification of rulings by the arbitrators is strictly limited.**
- **The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.**

You agree to arbitrate any disputes between Piper Jaffray and you. You specifically agree and recognize that all controversies which may arise between Piper Jaffray, its agents, representatives or employees and you concerning any transaction, account or the construction, performance or breach of this or any other agreement between us, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration to the full extent

provided by law. Such arbitration shall be in accordance with the rules then in effect of the Arbitration Committee of the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc. as you may elect. You authorize Piper Jaffray, if you do not make such election by registered mail addressed to Piper Jaffray at its main office within 15 days after receipt of notification from Piper Jaffray requesting such election, to make such election on your behalf.

However, it is understood, no person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until:

(i) the class certification is denied;

(ii) the class is decertified; or

(iii) the customer is excluded from the class by the court.

Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

Piper Jaffray Self-directed IRA

APPLICATION

PIPER JAFFRAY

* * *

C. ACCEPTANCE, ARBITRATION AGREEMENT AND SIGNATURE . . .

(4) The Customer Agrees to Arbitrate:

- **Arbitration is final and binding on the parties.**
- **The parties are waiving their right to seek remedies in court, including the right to jury trial.**
- **Pre-arbitration discovery is generally more limited than and different from court proceedings.**
- **The arbitrators' award is not required to include factual findings or legal reasoning and any party's right to appeal or to seek modification of rulings by the arbitrators is strictly limited.**
- **The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.**

I agree to arbitrate any disputes between Piper Jaffray and me. I specifically agree and recognize that all controversies which may arise between Piper Jaffray, its agents, representatives or employees and me, concerning any transaction, account or the construction, performance or breach of this or

any other agreement between Piper Jaffray and me, whether entered into prior, on, or subsequent to the date hereof, shall be determined by arbitration to the full extent provided by law. Such arbitration shall be in accordance with the rules then in effect, of the Arbitration Committee of the New York Stock Exchange, Inc. or the National Association of Securities Dealers, Inc. as I may elect. I authorize Piper Jaffray, if I do not make such election by registered mail addressed to Piper Jaffray at its main office within 15 days after receipt of notification from Piper Jaffray requesting such election, to make such election on my behalf. However, it is understood, no person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court.

Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

CASE STATUS AS OF 07/08/05

Plaintiff	MT Supreme Court Docket No.	Disposition
Terri A. Bagley v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-446	Appeal dismissed after mediation
Vicki Berryman v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-585	Affirmed
Sandra Brown v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-447	Appeal dismissed after mediation
John P. and Audrey Daly v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-490	Affirmed
Roberta J.Emett/Kathleen E. Merrett v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-517	Affirmed
Estate of Alice A. Franey U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-493	Affirmed
Joseph Froehlich, et al. v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-495	Settled at mediation/to be dismissed
Raymond Kaufman, et al. v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-491	Pending in MT. Sup. Court
James Leary v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-448	Affirmed
Suzanne McGee v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-494	Appeal dismissed after mediation
Margaret McGrath v. U.S. Bancorp Piper Jaffray Inc., et. al.		Dismissed after mediation but before appeal filed
Debbie Mueller v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-530	Appeal dismissed after mediation
Mike Paffhausen v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-449	Pending in MT Sup. Court
Juanita Periman v. U.S. Bancorp Piper Jaffray Inc., et al.	Case No. 04-450	Settled at mediation/to be dismissed
Evelyn Pickett v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-533	Settled at mediation/to be dismissed
John D. Shea and Brenda Shea v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-451	Affirmed
James and Brenda Shea v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-532	Appeal dismissed after mediation
James Staedt v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-492	Appeal dismissed after mediation
Stephen C. Tomazich v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-452	Pending in MT. Sup. Court
Robert and Sheryl Tremis v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-453	Appeal dismissed after mediation
Shirley A. Turley v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-431	Settled at mediation/to be dismissed
Harry Willems v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-454	Affirmed, then dismissed as a result of mediation
Nancy Zigrang v. U.S. Bancorp Piper Jaffray Inc., et. al.	Case No. 04-455	Pending in MT Sup. Court

No. 05-86

FILED
SEP 27 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

PIPER JAFFRAY & CO., and ROBERT ENGLISH, et al.,

Petitioners,

v.

JOHN P. DALY and AUDREY M. DALY, JOHN D. SHEA and BRENDA SHEA, THE ESTATE OF ALICE A. FRANEY, ROBERTA J. EMETT and KATHLEEN E. MERRETT, VICKI BERRYMAN and JAMES LEARY,

Respondents.

On Petition For Writ Of Certiorari To The Montana Supreme Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review the unpublished decisions of the Montana Supreme Court in which the Montana court simply followed the dictates of the Federal Arbitration Act according to its express terms by applying state laws governing fiduciary duties?

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STATEMENT OF THE CASE

Respondents John P. Daly, Audrey M. Daly, John D. Shea, Brenda Shea, the Estate of Alice A. Franey, Roberta J. Emett, Kathleen E. Merrett, Vicki Berryman and James Leary, are among 23 victims of USBancorp Piper Jaffray Inc., Piper Jaffray, Inc.,[1] Robert English ("Piper"), and Thomas J. O'Neill's unethical and deceitful securities practices which were initially discovered and litigated by the Securities Department of the Office of the State Auditor of Montana. Respondents filed Complaints against Piper alleging that, *inter alia,* Piper embarked upon a fraudulent scheme with regard to Respondents' retirement or life savings accounts. That fraudulent scheme was orchestrated by a long-time Piper securities broker who is now in a federal penitentiary for his admitted violations of federal securities laws committed in some transactions which gave rise to this civil action. His fraudulent conduct consisted of unauthorized and excessive trading activity ("churning"), inappropriate and speculative trading activity, unauthorized borrowing on margin, and intentional non-disclosure of central agreement terms and activities, as well as intentional and deceitful representations, inducements, and concealment. The broker, Tom O'Neill, was a former Piper Jaffray branch manager who had been previously stripped of that position, and placed

[1] Piper's Rule 29.1 corporate disclosure makes representations as to a corporate restructuring during the pendency of these actions pursuant to which Piper Jaffray & Co. is now the appropriate party to this litigation. Respondents do not concede Piper Jaffray & Co. is the proper party, or that it has been properly substituted, and reserve their objections pending discovery into the restructuring, including a determination of whether the restructuring was undertaken to thwart Respondents herein and limit liability exposure in these and other pending legal actions.

on state ordered probation for prior violations of Montana securities laws. In addition to O'Neill's felonious conduct which gave rise to these cases, Respondents alleged that Piper Jaffray had failed to properly supervise O'Neill, as required of it by his probation, and had ceremoniously lauded the huge commissions his illegal activity had generated. Since the filing of these cases, O'Neill pled guilty to two counts of unauthorized trading in the accounts of two clients and was sentenced in April 2005 to two years in a federal prison. He and Piper Jaffray were also ordered to make partial restitution and pay fines to the State of Montana based upon the Montana State Auditor's action. After Respondents filed their individual Complaints in state district court, which were variously assigned to three trial judges, Piper moved to compel arbitration. Piper's motions were denied by the respective trial judges, in separate written decisions,[2] after evidentiary hearings conducted by them sitting *en banc*.

Subsequently, Piper filed a Notice of Appeal in each case, except where the case had been settled before the appeal time had run. Of the 23 cases, appeals are still pending in four cases and 13 cases have been settled. Five of the six cases captioned above have been decided by the Montana Supreme Court and have not settled. The case of Daly settled after Petitioner filed its petition with this Court. All of the cases for which review is sought before this Court are unpublished opinions by the Montana

[2] Roberta J. Emett and Kathleen E. Merrett, 4/22/04, Cause No. DV-02-29; Vicki Berryman, 5/5/04, Cause No. DV-02-78; James Leary, 4/7/04, Cause No. DV-02-91; John P. Daly and Audrey M. Daly, 4/22/04, Cause No. DV-02-14; John D. Shea and Brenda Shea, 4/7/04, Cause No. DV-02-207; and the Estate of Alice A. Franey, 4/22/04, Cause No. DV-02-36.

Supreme Court. In those six decisions, there were no dissenting opinions filed by any of the justices.

In rejecting Piper's appeal, the Montana Supreme Court held that based upon the factual circumstances of each case and the particular language of the broker contracts, a fiduciary duty existed between the broker and the Respondents. The language of the broker contracts granted brokers unfettered discretion to buy, sell, or trade securities in customer accounts under certain circumstances. Pursuant to this fiduciary duty, defined by state law, the broker had a duty to explain the essential contract terms.

Included within those essential terms, which the Montana Supreme Court held the broker had a fiduciary duty to explain to the Respondents, was a pre-dispute arbitration provision as well as a unique "opt-out" policy. Within the opt-out policy, Respondents could decline to arbitrate disputes by requesting to cross out that provision. This opt-out policy is an "internal policy" of Piper and is not mentioned on the face of the broker agreements. It was basically conceded, and the court found, that no one had discussed or offered the "opt-out" policy to Respondents.[3] Such a policy is most unusual in the securities industry and, because the broker did not explain the predispute arbitration provision and the related opt-out

[3] The local Piper manager, English, and another local Piper broker admitted their local branch did not have a custom or practice of explaining the opt-out policy to customers. The broker who opened the accounts at issue herein, O'Neill, under indictment for a host of violations of federal securities laws, refused to testify, on Fifth Amendment grounds, in any subsequent civil proceedings or administrative actions.

policy to the Respondents in violation of his fiduciary duty, the Montana Supreme Court held that the arbitration provision was not enforceable.

Each of the decisions for which Piper has filed a Petition for Certiorari incorporates the reasoning of the Montana court in *Willems v. USBancorp Piper Jaffray, Inc. et al.*, 2005 MT 37, 326 Mont. 103, 107 P.3d 465 (decided February 22, 2005) (App. 23-25),[4] which has settled. Piper is seeking review of six of the unpublished decisions of the Montana Supreme Court which addressed the scope of the fiduciary duty arising under state law between securities brokers and their customers in instances where the agreement between the parties grants the brokers unfettered authority to buy, sell, or trade securities in a customer's account.

SUMMARY OF ARGUMENT

Certiorari is not appropriate in the instant cases because no federal question was addressed by the Montana court; rather, the court clarified the scope of the fiduciary duty which arose under state law from the unique factual circumstances of these cases. Moreover, even if a federal question is implicated, this Court should decline to exercise its discretion in granting review because compelling reasons do not exist for certiorari in these inimitable, fact-driven cases where Piper, at best,

[4] *Willems* had been settled in principal by Piper Jaffray shortly before the opinion was issued but before the parties had moved to dismiss the appeal as moot. As a result, *Willems* is not one of the cases for which review by this Court may be sought.

seeks to challenge the state court's application of the facts to the law. The Montana Supreme Court simply applied Montana state law regarding the duty of a fiduciary to the Respondents in this case. Because Piper fell short of that duty, the Montana Supreme Court appropriately found Piper's arbitration provision to be unenforceable. Having appropriately applied Montana law regarding fiduciary duties to these brokerage accounts, and in compliance with the express provisions of the Federal Arbitration Act requiring states to apply state law, certiorari is not appropriate. This is a simple, unpublished state law matter of no precedential value beyond its peculiar facts. Piper has attempted to dress up the issue as a federal one, which it decidedly is not.

REASONS FOR DENYING PETITION FOR CERTIORARI

Section 2 of the Federal Arbitration Act (FAA) provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2. This provision of the FAA "provides the touchstone for choosing between state-law principles and principles of federal common law envisioned by the passage of that statute." *Perry v. Thomas,* 482 U.S. 483, 492, n.9 (1987). "An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law.* . . . State law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Id.* "States may regulate contracts, including arbitration clauses, under general contract law principles and they

may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.'" *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

This principle comports with the general rule that contract law is typically the domain of the state. See *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979); *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Thus, generally applicable state law contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening Section 2 of the FAA. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). In short, state law governs contract formation and revocation questions, and also is applied to determine questions of validity. *Id.*

What states may not do is invalidate arbitration agreements under state laws applicable only to arbitration agreements. *Doctor's Associates, Inc.*, 517 U.S. at 687 (*citing Allied-Bruce*, 513 U.S. at 281; *Perry*, 482 U.S. at 492, n.9). "By enacting § 2, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* (*citing Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). In fact, one of the fundamental tenets of the FAA is that arbitration provisions should exist "upon the same footing" as all other provisions in a contract. *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 474 (1989).

The issues presented herein arise under state law. Piper identifies no Montana state laws applicable only to arbitration agreements which would invoke federal jurisdiction, or

require the application of federal law. Nor did the Montana court in the lead case of *Willems*[5] identify any such law singling out arbitration agreements. Rather, the Montana court applied state laws to find that a fiduciary duty arose between the broker and the investors herein. This duty arose NOT from the arbitration provision contained in the contract, but from the contract provision which granted Piper control to buy, sell and trade securities in the investors' accounts whenever Piper, in its discretion, deemed it necessary or appropriate. *Willems*, ¶ 25 (App. 31-32). Thus, the *Willems* holding itself has less to do with arbitration than it has to do with the scope of fiduciary duties under Montana law. This is a matter that is appropriately left to the individual states under our federal system. *See, e.g., Aronson,* 440 U.S. at 262. Because the Montana court applied general principles of state law, and did not single out the arbitration agreement, review by this Court upon a writ of certiorari is not warranted.

In fact, the Montana court expressly identified the FAA provision (and the identical state counterpart) and applied state law as required by that Act. In the lead case of *Willems*, the Montana court expressly recognized the dictates of the FAA[6] when it held:

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[5] The *Willems* case itself is not strictly before the Court because the parties reached a settlement after the case was remanded to the District Court. However, as set forth in the Statement of the Case section, the Montana Supreme Court relied on the analysis in *Willems* in issuing non-published opinions in the six cases presently before the Court on Piper's Writ of Certiorari.

[6] 9 U.S.C. § 2 provides: "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such

(Continued on following page)

> We conclude that the District Court created no new special legal standards but instead properly applied Montana case law by relying on *Kloss*.[7] *The FAA provides that an agreement to arbitrate is valid except where grounds exist at law or in equity to revoke the contract* . . . Montana law also requires the enforcement of predispute arbitration clauses except upon grounds that exist at law or in equity for the revocation of a contract. *Kingston v. Ameritrade, Inc.*, 2000 MT 269, 302 Mont. 90, 12 P.3d 929.

Willems, at ¶ 27 (App. 34) (emphasis added).

In *Willems*, the Montana court reviewed the provision in the Piper contracts which provided: "whenever Piper Jaffray deems it necessary for its protection, Piper Jaffray is authorized (but is not required) to: . . . Purchase sell, assign, receive and deliver all or any part of the securities held or carried for you."[8] *Willems*, ¶ 17 (App. 29). Under Montana law, "a fiduciary relationship is created whenever a broker has

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contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

[7] *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 37, 310 Mont. 123, 54 P.3d 1.

[8] Piper's contention in its Petition that the agreement's language granting broker discretion is standard in the industry was neither presented nor proven below or considered or ruled upon by the Montana Supreme Court. Although it is irrelevant to the issues before this Court, Respondents are not waiving their right to oppose this contention. Likewise, Respondents do not waive their right to oppose Piper's contentions that the account documents signed by Respondent Jim Leary did not contain language triggering a fiduciary duty, or that Respondents Shea signed or received the account documents.

discretion to buy, sell, or otherwise control a client's account." *Willems,* ¶ 14 (App. 28) (*citing Chor v. Piper, Jaffray & Hopwood, Inc.,* 261 Mont. 143, 153, 862 P.2d 26, 32 (1993). Thus, this general contract provision, having nothing to do with arbitration, created a fiduciary duty. Under Montana law, a fiduciary must make full disclosure of all facts relevant to the transaction and relationship between the parties. *See, e.g., Kitchen Krafters Inc. v. Eastside Bank of Montana, et al.,* 242 Mont. 155, 163, 789 P.2d 567, 571 (1990); *Watson v. Fultz,* 239 Mont. 364, 368, 782 P.2d 361, 363 (Mont. 1989).

The Montana court has not singled out arbitration in the application of the fiduciary duty of full disclosure. Indeed, in the case of *Murphy v. Redland,* 178 Mont. 296, 583 P.2d 1049 (1978), the Montana court applied the same fiduciary duty definition used in *Willems* to deny a joint adventurer (Redland) the right to recover damages from his fellow joint adventurer (Murphy) when the damage was caused by Redland's failure to disclose a cattle sale. Similarly, in *Deist v. Wacholz,* 208 Mont. 207, 678 P.2d 188 (1984), the Montana court found a special relationship between a bank officer and a bank customer which gave rise to a fiduciary duty on behalf of the bank officer to disclose his involvement in the purchase of a ranch.

Further evidence that the Montana court does not "single out" arbitration in the application of its fiduciary duty law can be found in the case of *Chor.* In *Chor,* the Montana court held that "in the absence of discretionary authority by a stockbroker to buy and sell in a customer's account, no fiduciary relationship is created in a broker-customer relationship." *Chor,* 261 Mont. at 152, 86 P.2d at 31-32. Because the *Chor* court found in that case that no such "discretionary authority" existed, it did not hold

Piper's broker to any fiduciary duty and it enforced the arbitration provision.

In the cases at issue herein, the Montana court (based on the *Willems* analysis), having found that Piper had retained "discretionary authority," applied the well-established rules concerning the duties of a fiduciary to disclose relevant information about the relationship. Here, Piper had an internal policy that allowed investors to "opt-out" of the arbitration requirement by simply crossing out the arbitration provision. This policy is not a written part of the agreement. In fact, it is quite unique in the securities industry. In each of the cases currently before this Court, it was undisputed that Piper failed to disclose its policy of allowing customers to "opt-out" of arbitration by crossing out the provision in the contract. The Montana court simply held that, under these exceptional circumstances, Piper, as a fiduciary, owed its investor clients the duty to disclose the consequences of the arbitration provision and this "opt-out" information. *Willems, supra,* ¶¶ 23, 25 (App. 33). Such a duty arises from state law dealing with fiduciaries and would apply to all contracts whether dealing with arbitration or not. Thus, the Montana court in *Willems* did nothing more than require such disclosure based upon the fiduciary relationship which was formed by Piper's own form agreement. Application of this fiduciary duty is therefore consistent with the FAA and as such the issuing of a Writ of Certiorari is not warranted.

State courts have issued thousands of decisions dealing with the nature and scope of a fiduciary duty. Many state courts, just like the Montana state court, quote Justice Cardozo in the case of *Meinhard v. Salmon*, 249

N.Y. 458, 164 N.E. 545 (1928),[9] who explained the nature of the fiduciary duty as follows:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Id. at 464, 164 N.E. at 546.

Central in most cases dealing with a fiduciary's duties is the idea that a fiduciary must fully disclose all relevant

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[9] *Kloss v. Edward D. Jones & Co.*, 2002 MT 129, ¶ 37, 54 P.3d 1, 9, ¶ 37, 310 Mont. 123, 135, ¶ 37. The following is a sample of the state court decisions which relied on the *Meinhard* decision in analyzing the scope of fiduciary obligations: *Lindsay v. Marcus*, 137 Colo. 336, 325 P.2d 267 (Colo. 1958); *Brown v. Halbert*, Division Three, 271 Cal. App. 2d 252, 76 Cal.Rptr. 781 (Cal.App. 1969); *In re Evans*, 113 Ariz. 458, 556 P.2d 792 (Ariz. 1976); *Ditis v. Ahlvin Const. Co.*, 408 Ill. 416, 97 N.E.2d 244 (Ill. 1951); *Amoco Prod Co. v. Charles B. Wilson, Jr. Inc.*, 266 Kan. 1084, 976 P.2d 941 (Kan. 1999); *Appeal of Concerned Corporators of Portsmouth Sav. Bank*, 129 N.H. 183, 525 A.2d 671 (N.H. 1987); *Silverman v. Bresnahan*, 35 N.J. Super. 390, 114 A.2d 307 (N.J. 1955); *Young v. Field*, 548 So. 2d 784 (Fla. 1989); *Van Stee v. Ransford*, 346 Mich. 116, 77 N.W.2d 346 (Mich. 1956); *Ellezy v. Fyr-Pruf Inc.*, 376 So. 2d 1328 (Miss. 1979).

matters concerning its dealings. (See Footnote 9, *supra*.) Montana's court, like every state court, employs its fiduciary duty law routinely to decline to enforce contracts when there has been a lack of disclosure. *See, e.g., Deist,* 208 Mont. at 228, 678 P.2d at 198; *Watson,* 239 Mont. at 368, 782 P.2d at 363. Contrary to Piper's suggestion, the Montana court's decisions at issue herein do not conflict in any way with the decisions of the appellate courts of other states. See *Petition for Writ of Certiorari,* pp. 22-24, n.15. The cases cited by Piper have nothing to do with the fiduciary duty which formed the basis of the Montana court's decision. Moreover, in that the laws relating to fiduciary duty and contract formation are the province of the states, any potential conflicts among the laws of such states relating to fiduciary duty and contract formation and revocation constitute permissible differences of opinion. *Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938).

Pursuant to Supreme Court Rule 10, a review on a writ of certiorari is not a matter of right but of judicial discretion and will be granted only for "compelling reasons." No compelling reasons exist for this Court to review the six unpublished decisions of the Montana court at issue herein. This is particularly true given that one of the six (Daly) was settled after the petition was filed. Further, no substantial federal questions are presented. Nor does an impermissible conflict among the state courts of last resort exist as to any federal question. Both the FAA and Montana's statutory law [Mont. Code Ann. § 27-5-114(2) (2003)] provide that arbitration agreements are valid "except where grounds exist at law or in equity to revoke the contract." Here, citing Section 2 of the FAA, the Montana court declined to enforce the arbitration provision in

question based upon the well-established Montana law concerning fiduciary obligations that it applies to all such contracts, not just contracts involving arbitration. For these reasons, the Montana court correctly considered and applied the Federal Arbitration Act law in connection with the facts of these cases, including those arising from Piper's unique "opt-out" policy which gave rise to a fiduciary duty to explain its existence and terms to the client. Given that the Montana court's analysis and application of state law generally governing contract formation is not in conflict with the FAA,[10] this Court should not review this matter on a writ of certiorari.

[10] At most, Piper has alleged the misapplication by the Montana court of a properly stated rule of law, a situation which this Court, pursuant to Supreme Court Rule 10, has concluded does not constitute the requisite "compelling reason" for granting a petition for certiorari.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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September 27, 2005

Supreme Court, U.S.
FILED
OCT 6 - 2005
OFFICE OF THE CLERK

No. 05-86

In The Supreme Court of the United States

PIPER JAFFRAY & CO., and
ROBERT ENGLISH, et al.,

Petitioners,

v.

JOHN P. DALY and AUDREY M. DALY, JOHN D. SHEA and BRENDA SHEA, THE ESTATE OF ALICE A. FRANEY, ROBERTA J. EMETT and KATHLEEN E. MERRETT, VICKI BERRYMAN and JAMES LEARY,

Respondents.

On Petition For Writ Of Certiorari To The Montana Supreme Court

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INTRODUCTION

Petitioners seek this Court's review to ensure that the Montana Supreme Court complies with the Federal Arbitration Act, this Court's admonishment in *Doctor's Associates, Inc. v Casarotto*, 517 U.S. 681 (1996), and well-settled federal law with respect to the cases at issue here. Only then will the Montana courts begin to enforce arbitration provisions in a manner consistent with the Federal Arbitration Act, this Court's precedent and well-settled federal law.

> Inevitably a national corporation, like the Subway sandwich franchisor in *Casarotto*, will not tailor its arbitration clause or its waiver of rights to the requirements the Montana Supreme Court enumerated in *Kloss* and the arbitration provision will be struck down. The U.S. Supreme Court held in *Casarotto* that the legislature could not enact provisions that restrict arbitration in that situation. And in footnote three to that case, it warned the courts not to do what the legislature may not do. [citation omitted] But the Montana Supreme Court has now accomplished what the legislature was unable to do – the regulation if not the prohibition of pre-dispute arbitration clauses in Montana. It is possible that the higher court will right this wrong, or even that a reconstituted Montana Supreme Court will see things differently. Until that time, however, arbitration is dead in Montana.

Scott J. Burnham,[1] *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, 200 (2005).

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[1] Scott J. Burnham is a Professor of Law at the University of Montana School of Law. Scott J. Burnham, *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, n.1 (2005).

Contrary to Respondents' argument, this case is not about the Montana Supreme Court clarifying or applying Montana law concerning fiduciary duty. Instead, this case is about the Montana Supreme Court's continuing assault upon the Federal Arbitration Act, this Court's previous rulings, and federal policy and well-settled federal law favoring arbitration as a means of dispute resolution. This assault impermissibly ignores the prior precedent of this Court and must necessarily fail for that reason alone.

The Montana Supreme Court's holding that a broker dealer has a fiduciary duty to explain an arbitration clause, but no other contract provision to a prospective client, *before* the client signs the contract containing the arbitration clause, places arbitration clauses in a class apart from other contract provisions in violation of the Federal Arbitration Act. This Court chastised the Montana Supreme Court for precisely such action in *Casarotto*, but the Montana Supreme Court seems determined to ignore that admonishment and continue its misguided course. Despite Respondents' claim to the contrary, Petitioners raised this federal question to the Montana Supreme Court and that Court specifically held that the Federal Arbitration Act was not violated. *Willems*, ¶¶ 26, 27 (App. 33, 34).

The Montana Supreme Court does not uniformly apply its law pertaining to fiduciary duty. Instead, it applies a different and higher duty to arbitration provisions with the resultant effect of wholly invalidating pre-dispute arbitration provisions in standardized brokerage agreements in Montana. The Montana Supreme Court's decision is contrary to virtually every other federal and state court jurisdiction uniformly enforcing pre-dispute arbitration provisions and further impairs the contract

rights of broker dealers and their clients, thus placing an undue and substantial burden on interstate commerce in violation of the Commerce Clause.

I. The Salient Reasons For Granting Certiorari Have Not Been Challenged.

Respondents' Brief in Opposition is most telling in what it does not say. United States Supreme Court Rule 15.2 provides Respondents have an obligation to point out in their Brief in Opposition any perceived misstatements of fact or law in the Petition, otherwise the objection may be deemed waived. Respondents did not identify any perceived misstatements of law or fact in response to Petitioners' three principal arguments.[2]

With respect to Petitioners' first argument, Respondents do not dispute that the Montana Supreme Court held the *only* contract provision the broker had a fiduciary duty to explain was the arbitration provision. Respondents instead argue this holding does not single out arbitration clauses, but is consistent with Montana's fiduciary duty of "full disclosure." Resp'ts' Opp'n at p. 9. Full disclosure,

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[2] The first three pages of Respondents' Brief in Opposition contain factual allegations that are unproven and wholly irrelevant to this Court's analysis and decision. Respondents' recitation of irrelevant allegations is inappropriate and should not be considered by this Court. Moreover, entirely absent from Respondents' purported factual statement are any allegations touching upon fraud or duress with respect to the arbitration clause itself. The absence of such potentially relevant allegations is understandable because no such allegations have been made throughout the course of these proceedings. Indeed, the Montana Supreme Court has found that the arbitration clause was not discussed when the agreement was signed. *Willems* ¶ 25.

however, would require the broker to explain *every* provision, not just the arbitration provision.

Further, Respondents offer no response to Petitioners' description of Montana's historical hostility toward arbitration. Respondents fail to come to grips with the fact that the instant rulings are fundamentally no different than the Montana Supreme Court's rulings in the *Casarotto* series of cases[3] in which this Court struck down a Montana statute which treated arbitration clauses differently than any other contract provision.

It is no wonder Respondents made the tactical decision to ignore the fundamental holding in *Casarotto,* because it is apparent from the Brief in Opposition they either misapprehend or have intentionally misstated the express language of the Federal Arbitration Act and the previous decisions of this Court interpreting that Act, including most notably *Perry v. Thomas*, 482 U.S. 483 (1987). In *Perry*, this Court specifically admonished that courts may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot." *Perry, supra*, at 492, n.9.

Respondents ignore in the first instance that the Federal Arbitration Act limits the application of state law to only that law providing for revocation of the contract generally. *Id*. Respondents also ignore the fact that the

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[3] *Doctor's Associates, Inc. v. Casarotto*, 515 U.S. 1129 (1995); *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996); *Casarotto v. Lombardi*, 886 P.2d 931 (Mont. 1994); *Casarotto v. Lombardi*, 901 P.2d 596 (Mont. 1995).

Montana Supreme Court has not found that sufficient grounds exist for the revocation of the customer agreements at issue here on the basis of fraud, fraudulent inducement, mutual mistake, or any other of the grounds generally applicable in state contract law. Rather, the Montana Court singled out the arbitration provision alone for invalidation and otherwise left the contracts in place and enforceable.

The ruling of the Montana Court created an impossible burden for any broker dealer to meet by requiring a nebulous affirmative obligation to disclose and explain the arbitration provision, and only the arbitration provision, in a level of detail which inexplicably goes beyond the written disclosure which is already found in the contracts at issue and which complies with the Montana Court's own earlier requirement enunciated in *Mueske v. Piper Jaffray & Hopwood, Inc.*, 859 P.2d 444 (Mont. 1993). In so doing, the Montana Supreme Court has impermissibly imposed a burden which is incapable of determination or satisfaction, and significantly greater than the legislatively created burden that was found unacceptable in *Casarotto*. Simply put, the Montana Court has impermissibly singled out arbitration clauses in a way which this Court has already rejected. The Montana Supreme Court must heed the admonishment of both *Casarotto* and *Perry*: that it may not do what the legislature cannot.

Further, Respondents concede a fiduciary duty between an investment advisor and his or her client does not exist absent a grant of discretionary authority, but Respondents do not address Petitioners' argument that a fiduciary duty created by an agreement cannot exist *before* the agreement creating the duty is signed. Resp'ts' Opp'n at pp. 9-10; (*citing Chor v. Piper Jaffray & Hopwood Inc.*,

862 P.2d 26, 32 (1993)). The Montana Supreme Court's creation of such a pre-existing fiduciary duty merely serves to underscore its result oriented analysis and pre-determined objective to strike down pre-dispute arbitration clauses.

Respondents also repeatedly misstate the Montana Supreme Court's findings. Respondents incorrectly state the Montana Supreme Court held Petitioners had a fiduciary duty to explain Piper's policy permitting clients to cross out the arbitration provision. Resp'ts' Opp'n at pp. 3, 10. The Montana Supreme Court, however, did not find Piper had a fiduciary duty to explain the opt-out policy as it stated, "We affirm the District Court's conclusion that Piper owed a fiduciary duty to explain the arbitration provision to Willems. . . . " *Willems* ¶ 28 (App. 34).

Respondents also fail to explain how the Montana Supreme Court's reference to *Kloss* is a proper application of state law when the facts in *Kloss* are significantly different than those here. *Kloss v. Edward D. Jones*, 2002 MT 129, 310 Mont. 123, 54 P.3d 1, *cert. denied*, 538 U.S. 956 (2003) ("*Kloss I*"); *see also*, *Kloss v. Edward D. Jones*, 2002 MT 129A, 54 P.3d 41, *cert. denied*, 538 U.S. 956 (2003) ("*Kloss II*").

In *Kloss*, Mrs. Kloss began a relationship with her broker in 1985, opened a full service account in 1989 and established a living trust account in 1992. *Kloss I* at 125-26, 54 P.3d at 3-4. Both account agreements contained arbitration provisions (*Kloss I* at 126, 54 P.3d at 4), and the 1992 agreement contained the same discretionary language deemed by the *Kloss* court to create a fiduciary duty. *Kloss II*, 57 P.3d at 41.

The fiduciary duty in *Kloss* was presumably created six years before Mrs. Kloss opened the account in question, the 1998 charitable trust, because the discretionary language deemed by the *Kloss* court to create a fiduciary duty was present in the 1992 agreement. Another significant distinguishing fact is that in 1998, when Mrs. Kloss opened her charitable trust account, she did not even sign the account agreement, but instead signed a detachable card acknowledging she received a copy of the agreement and incorporating an arbitration clause by reference. *Kloss I* at 126, 54 P.3d at 4. In contrast, here, the agreements signed by the customers contained the arbitration provisions, and also contained a thorough explanation of arbitration in the language of the arbitration provisions themselves. (App. 63-64). This language was approved and mandated by the U.S. Securities and Exchange Commission ("SEC"). Rule 3110(f) National Association of Securities Dealers ("NASD") Manual. Thus, to the extent any explanation of the arbitration clause was needed, it was provided in a manner consistent with the requirements of the SEC and NASD.

With respect to Petitioners' second argument, Respondents do not explain why Montana appears to be the only state that does not enforce pre-dispute arbitration agreements in securities contracts. In two sentences, Respondents dismiss Petitioners' extensive list of contrary decisions in other states in footnote fifteen of the Petition by stating these decisions do not conflict with the decisions below and have nothing to do with the basis of the Montana Supreme Court's decision. Resp'ts' Opp'n at p. 12. Not only is this explanation vague and meaningless, but it is also contrary to the numerous cases listed in footnote fifteen.

With respect to Petitioners' third argument, Respondents do not dispute that the Montana Supreme Court's decisions will impair the Petitioners' and other broker-dealers' ability to rely upon uniform agreements drafted in compliance with SEC regulations when executed in Montana by Montana clients. Respondents also do not challenge Petitioners' arguments that the Montana Supreme Court's decisions violate the Commerce Clause because they will place an undue and substantial burden on interstate commerce by impairing Petitioners' right to contract in Montana.

II. *Willems* And The Cases Based On *Willems* At Issue Here Establish A Dangerous Precedent For Undermining Arbitration Provisions Nationally.

The *Willems* decision was recently identified as one in a series of cases that will roll back the enforcement of predispute arbitration laws, in contravention of established U.S. Supreme Court precedent:

> The passage of time and events, particularly the increased use of contracts of adhesion containing mandatory arbitration clauses to avoid judicial enforcement of federal and state anti-discrimination and consumer protection laws, is leading many appellate courts to distinguish and weaken the significance of these [U.S. Supreme Court] precedents from an earlier time in the development of arbitration law.

Barrett v. McDonald Investments, Inc., 870 A.2d 146, 153 (Me. 2005) (Alexander, J., concurring).

The enforceability of arbitration clauses is clearly under siege in Montana, and one commentator has indeed suggested that the battle is already over. *See* Burnham, Scott J., *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, 201 (2005) (" . . . arbitration is dead in Montana"). Absent immediate intervention by this Court, the Montana Supreme Court's continuing refusal to heed this Court's rulings or enforce the Federal Arbitration Act will be assured.

CONCLUSION

For the foregoing reasons and those stated previously, Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari.

Respectfully submitted this 6th day of October 2005.

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